91-1877

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER 1991 TERM

THE COLORADO DEPARTMENT OF HIGHWAYS and THE COLORADO DIVISION OF HIGHWAYS, PHILLIP PACHECO, EARMAN PACHECO, MERLE ZIMER, PHILLIP WEST, ROSS HAMILTON, EDWARD FINK, JOHN M. SALAZAR, R.L. CLEVENGER, DWIGHT BOWER, PHIL MCCULLOUGH, and LOWELL JACKSON,

Petitioners,

v.

YVONNE E. DEFOOR, FRANK BOWEN; MARGIE BOWEN; ELINOR M. BUTENHOFF; URS FREI; MICHAEL HATTON; THE ESTATE OF ANNA HAYES, Deceased; THE CHILDREN AND ESTATE OF ARLENE JOHNSON, Deceased; ESTATE OF JOHN KILLEEN, Deceased; ESTATE OF MARKUS LANG, HERBERT LAND, as survivor, heir and personal representative of Markus Lang, and THE ESTATE OF MARKUS LANG, RITA LAND, as survivor, heir and personal representative of Markus Lang and THE ESTATE OF MARKUS LANG, and ELFRIEDE BORRILLO, as Special Administrator of the Estate of Markus Lang; THE ESTATE OF DOUGLAS MACKENZIE, Deceased; SUZANNE MACKENZIE; MICHAEL MCGARVEY, NANCY MCGARVEY; BERNADINE M. REMMERS; CAROL J. SMITH, THOMAS C. SMITH, and MEAGAN N. SMITH, a minor; THE ESTATE OF GLADYS STEWART, Deceased; THE ESTATE OF SOL STEWART, Deceased; THE CHILDREN AND ESTATE OF KEITH WALTERS, Deceased; THE CHILDREN AND ESTATE OF KATHLEEN WALTERS, Deceased; HOROSHI YOSHIOKA; MORDEKHAY FUMISHIKA; MASHASIKI NAKAYAMA; MIKAYO TAJIMA; and RODNEY ALVA WEST; and CLARENDON NATIONAL INSURANCE COMPANY; SAN JUAN TOURS, INC.,

[*continued*]

d/b/a GRAY LINE TOURS; and all persons or entities suffering, or claiming to suffer, damages resultant from the August 10, 1987, collision between a boulder and a Gray Line Tour Bus on U.S. Highway 40, about seven miles east of Winter Park, Colorado, while the bus was on Berthoud Pass,

Respondents,

and

THE STATE OF COLORADO, by and through the Colorado State Claims Board of the Division of Risk Management,

Plaintiff-Appellee,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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QUESTIONS PRESENTED

1. Whether the Colorado Supreme Court's order reversing the trial court's dismissal of claimants' civil rights claims against the individually named public official and employee third party defendants, which implicitly acknowledges the validity of claimants' allegations of constitutional violations arising out of a roadway accident, erroneously elevates an ordinary tort claim into a case of constitutional dimension and is inconsistent with this Court's recent holding in *Collins v. City of Harker Heights, Texas*, ____ U.S. ____, 112 S. Ct. 1061, 117 L.Ed.2d 261 (1992) and other decisions of this Court.

2. Whether the Colorado Supreme Court's decision erroneously holds that the individually named third party defendants are not entitled to qualified immunity as a matter of law.

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OPINION BELOW

The decision of the Colorado Supreme Court has been published at 824 P.2d 783 (Colo. 1992). The Berthoud Pass claimants' petition for rehearing was denied on February 24, 1992.

JURISDICTION

This Court has jurisdiction to entertain this petition for certiorari pursuant to the provisions of 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves 42 U.S.C. § 1983:

Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case involves a roadway accident in Colorado, precipitated when a boulder being moved by third-party defendant Phillip Pacheco, an employee of plaintiff, The State of Colorado, rolled downhill on an upper switchback on the west side of Berthoud Pass and struck a tour bus. Claimants are the

twenty-five individuals injured in the accident and the survivors of the nine individuals killed in the accident. The individual third-party defendants are State Department of Highways employees in the chain of supervision from Mr. Pacheco, the loader operator, to the Department director.

The Colorado Attorney General initiated the litigation by filing an interpleader action in Denver District Court on January 6, 1988. (Vol. I, pp.1-36) The Attorney General attempted to deposit the sum of $400,000 with the registry of the court (Vol. I, pp.37-38) pursuant to the statutory limitation on damages in tort litigation involving public entities pursuant to §24-10-114(1)(b), C.R.S. (1988 Repl. Vol. 10A) which states:

> The maximum amount that may be recovered under this Article in any single occurrence, whether from one or more public entities and public employees, shall be:
>
> * * *
>
> For an injury to two or more persons in any single occurrence, the sum of $400,000; except that, in such instance, no person may recover in excess of $150,000.

Claimants counterclaimed against the State of Colorado and filed a motion for summary judgment contending that §24-10-114(1)(b), C.R.S. violated their right to equal protection of the laws, access to courts, and due process of law. (Vol. I, pp.104-113; Vol. IV, pp.1153-1200) Claimants also filed third-party claims against the individually named defendants, who are officials and employees of the Colorado Department of Highways, generally alleging that they were following the customs and policies of the State of Colorado in their ditch-clearing operations and that "such acts and omissions were grossly negligent, reckless, and showed deliberate indifference to the public safety and human life, including but not limited to that of the defendant counterclaimants and other

members of the traveling public." (*See* amended counterclaims and third-party complaint of Clarendon National Insurance Company, San Juan Tours, Inc., d/b/a Gray Line Tours, and Rodney Alva West, ¶47, Vol. III, pp.786-797) Claimants also contended that the conduct of the individual third-party defendants in carrying out the policies and customs of the State of Colorado violated their constitutional rights and sought redress under 42 U.S.C. §1983.

The individual third-party defendants filed a motion to dismiss claimants' 42 U.S.C. §1983 claims, contending that the factual allegations contained in claimants' counterclaims did not state a claim for relief under 42 U.S.C. §1983. (Vol. IX, pp.2362-2364) The individual third-party defendants also alleged in their motion to dismiss that they were entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982).

The trial court granted the individual third-party defendants' motion to dismiss claimants' civil rights claims, leaving claimants' state law tort claims pending against the individual third-party defendants.[1] (Vol. X, pp.2526-2534) The trial court also held that the damage limitation contained in §24-10-114(1)(b), C.R.S. was not unconstitutional.

Claimants appealed the trial court's rulings to the Colorado Supreme Court. The Colorado Supreme Court affirmed the trial court's order upholding the constitutionality of §24-10-114(1)(b). However, the Court reversed the trial court's entry of summary judgment with respect to claimants' civil rights claims against the individual third-party defendants. Without articulating any specific rationale, or specific facts allegedly in dispute, the Court held that issues of material fact remained concerning claimants' §1983 allegations. 824 P.2d at 793.

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[1] The trial court certified pursuant to C.R.C.P. 54(b) the dismissed constitutional claims for purposes of appeal.

STATEMENT OF RELATED CASES

There are no related cases.

REASONS FOR GRANTING THE WRIT

A. The Colorado Supreme Court's Order Reversing the Trial Court's Dismissal of Claimants' Civil Rights Claims Against the Individual Public Official and Employee Third Party Defendants, Which Implicitly Acknowledges the Viability of Claimants' Allegations of Constitutional Violations Arising out of a Roadway Accident, Erroneously Elevates an Ordinary Tort Claim Into a Case of Constitutional Dimension and is Inconsistent With This Court's Recent Holding in *Collins v. City of Harker Heights, Texas*, ____ U.S. ____, 112 S. Ct. 1061, 117 L.Ed.2d 261 (1992) and Other Decisions of this Court

42 U.S.C. §1983 may not be construed to augment or replace state tort law even where a public entity or employee may be a tortfeasor. *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L.Ed.2d 662 (1986); *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L.Ed.2d 433 (1979); *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L.Ed.2d 405 (1976). The analysis necessary to differentiate tortious behavior by a state actor from that involving the deprivation of a federal civil right demands consideration of both the acts challenged and the status or role of the accused tortfeasor. When such an inquiry reveals that only the public employment status of one tortfeasor differentiates that tortfeasor from any other, no justification exists to allow a federal civil rights claim against the public entity or employee. *McCrary v. O'Hare*, 786 F.2d 863 (2nd Cir. 1986); *also see Rankin v. City of Wichita Falls, Texas*, 762 F.2d 444 (5th Cir. 1985). Of particular significance to claimants' allegations against the individual third-

party defendants in this case is the following statement of this Court in *Paul v. Davis, supra*:

> Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded. Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever system may already be administered by the States. We have noted the 'constitutional shoals' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law [cite], *a fortiori*, the procedural guarantees of the due process clause cannot be the source for such law.

96 S. Ct. at 1160.

The line of demarcation between tort law and civil rights litigation derives from the obvious Congressional purpose to provide a remedy for the abuse of authority arising under color of state law, in the form of 42 U.S.C. §1983, rather than to occupy the field of tort relief against public entities pursuant to the federal supremacy clause.

The distinction between the two types of cases was recently addressed by this Court in *Collins v. City of Harker Heights, Texas, supra*. There, an employee in the respondent city's sanitation department died of asphyxia after entering a manhole to unstop a sewer line. His widow brought an action under 42 U.S.C. §1983 alleging that her husband had a right under the due process clause to be free from unreasonable risk of harm and to be protected from the city's custom and policy of deliberate indifference toward its employees' safety. She further alleged that the city had violated that right by following a custom and policy of not training its employees about the dangers of working in sewers and not providing

safety equipment and warnings. The district court dismissed the complaint on the ground that it did not allege a constitutional violation. The Fifth Circuit Court of Appeals affirmed on the theory that there had been no "abuse of governmental power" which the court found to be a necessary element of a 42 U.S.C. §1983 claim. This Court rejected the reasoning of the Fifth Circuit, but affirmed its holding. The court did so on the basis that, allegations of "custom and policy of deliberate indifference" notwithstanding, the facts of the case did not give rise to a claim of constitutional proportion; the case presented a simple tort claim. The Court stated:

> We are also not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense. Petitioner's claim is analogous to a fairly typical state law tort claim: The city breached its duty of care to her husband by failing to provide a safe work environment.
>
> Because the due process clause 'does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society,' *Daniels v. Williams*, 474 U.S. at 332, we have previously rejected claims that the due process clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law [cites].

112 S. Ct. at 1070.

The Colorado Supreme Court's decision in this case cannot be reconciled with *Collins v. City of Harker Heights, Texas* or with previous decisions of this Court recognizing the distinction between civil rights claims and ordinary tort actions. Claimants' claims here are analogous to a fairly typical state law tort claim. Claimants contend that, with "deliberate indifference" the individual third-party

defendants followed customs and administered policies of the State of Colorado in:

(a) pushing large rocks, boulders and debris, which are dangerous and lethal to the traveling public, over embankments and slopes, without stopping or warning public traffic lawfully traveling on highways or roadways below;

(b) Requiring maintenance workers to work on projects involving the movement of dangerous and lethal rocks to the traveling public, in the absence of orders or direction from superiors;

(c) Requiring maintenance workers to move dangerous and lethal rocks and boulders without adequate instruction, training, guidance, and supervision;

(d) Requiring or allowing employees of the State of Colorado, the Colorado Department of Highways and/or Colorado Division of Highways to perform ditch-clearing operations and other highway maintenance tasks on mountainous terrain without adequate assistance from co-employees;

(e) Failing to post adequate numbers of flag persons and warning signs so as to stop traffic when ditch-clearing operations are performed on mountainous terrain;

(f) Training, instructing, supervising, and guiding employees of the State of Colorado, the Colorado Department of Highways and/or Colorado Division of Highways to perform ditch-clearing operations in mountainous terrain in a highly dangerous manner in grossly negligent, reckless, and deliberate disregard of the public safety;

(g) Emphasizing excessive work production standards by the State of Colorado, the Colorado Department of Highways and/or Colorado Division of

Highways employees with inadequate regard for the public safety;

(h) Requiring maintenance workers to forego known and relatively simple procedures to break dangerous and potentially lethal rocks into smaller, safer, and more manageable sizes.

(Amended counterclaims and third-party complaint of Clarendon National Insurance Company, San Juan Tours, Inc., d/b/a Gray Line Tours, and Rodney Alva West, ¶ 46). (Vol. III, pp.786-797) These activities challenged by claimants are no different in nature from activities that might be undertaken by various private enterprises. A mining company, logging firm, or private road building contractor could find the ordinary operations of its business generating a claim identical to those involved here. Claimants' allegations reveal that the only distinguishing aspect of this accident, when compared to an ordinary tort, is the involvement of government employees. Alone, this element cannot transform the matter into a 42 U.S.C. §1983 case. As only the employer of these alleged tortfeasors distinguishes this from other tort actions, no cognizable civil rights claim exists. *Daniels v. Williams, supra; Collins v. City of Harker Heights, Texas, supra.*

Moreover, claimants' allegations against the individual third-party defendants confuses the requisite conduct on the part of a *public entity* giving rise to liability under §1983 with allegations which are necessary to give rise to liability under §1983 of an *individual* public official or employee. Claimants' allegations regarding the individual third-party defendants carrying out the "customs and policies" of the State of Colorado would be relevant if they were directed at a municipality. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978) (local governing bodies can be liable under §1983 where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers, 98 S. Ct. at

2035-2036). Those same allegations directed at these individual third-party defendants are irrelevant. The appropriate inquiry is whether the third-party defendants, with at least deliberate indifference, violated constitutional rights of claimants which were clearly established at the time of the accident. *Daniels v. Williams, supra; Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987).

Since the allegations contained in claimants' third-party complaint against the individual third-party defendants states no more than an ordinary tort cause of action, the Colorado Supreme Court erred in holding that further factual determinations were necessary with respect to the 42 U.S.C. §1983 claims. However, assuming, *arguendo*, that the third-party complaints did allege a constitutional violation pursuant to §1983, as discussed below, any right claimants may have had, or may now have, under the Constitution were not "clearly established" at the time of this accident and, therefore, the individually named third-party defendants were entitled to qualified immunity as a matter of law.

B. The Colorado Supreme Court's Decision Erroneously Holds That the Individually Named Defendants are not Entitled to Qualified Immunity as a Matter of Law

Pursuing any §1983 civil rights claim for damages against an individual public servant, in the individual capacity of such person, requires that a claimant satisfy the four part test announced in *Anderson v. Creighton, supra*, and overcome the qualified immunity of public officials described in *Harlow v. Fitzgerald, supra.*

The test announced by *Anderson v. Creighton, supra*, allows a civil rights damage remedy against a public servant only once all of the following are shown:

1. The specific conduct of each named individual involved;

2. The alleged constitutional provision(s) implicated;

3. The contours of the constitutional provision(s), as clearly established at the time of the individual employee's behavior; and

4. How the behavior of each individual employee caused the rights violation alleged.

A civil right damages claimant must also convince a court that each named defendant was postured to recognize, as a reasonable person, that the challenged conduct threatened the established constitutional rights of the claimant, prior to any discovery or evidentiary process. No part of the *Anderson* requirements were satisfied by claimants' third-party complaints and, therefore, the Colorado Supreme Court's order of remand was inappropriate.

The third-party complaint allegations do not include any reference to specific conduct by individual State employees sufficient to determine just what each such person did in relation to this suit. At best, the only specific information relates to allegations that one person moved the rock in question. Nowhere else are specific actions or behaviors of individual employees particularized in the fashion demanded by *Anderson v. Creighton*. In the absence of particularized allegations, an adequate claim against an individual under 1983 cannot exist. *Martin v. D.C. Metro. Police Dept.*, 812 F.2d 1425, 1434 (D.C. Cir. 1987). Claimants may not rely on any inference of participation by named individuals in the supervision and control of roadway maintenance policy and procedure. Such reliance constitutes no more than an effort to implicate individuals, in their individual capacities, as a matter of *respondeat superior*, impermissible under § 1983. *Monell v. Dept. of Social Services, supra; Rizzo v. Goode*, 423 U.S. 362, 96 S. Ct. 598, 46 L.Ed.2d 561 (1976).

Claimants' reliance on existing highway department policy and procedure as the basis for these claims also highlights their dependence on factors possessing potential significance only in the analysis of public *entity* liability under § 1983, but

without any relevance to the analysis of public *employee* liability. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 103 L.Ed.2d 412 (1989).

The specific constitutional protections invoked by claimants also fail to sustain these claims. The allegations do not indicate that any identified constitutional provision could be implicated by a roadway accident, as those provisions were contoured in August, 1987. Claimants' substantive due process argument advanced in the Colorado Supreme Court is illustrative. No significant debate exists regarding the inability of government to deprive citizens of property without due process, either procedurally or substantively. Nonetheless, claimants can refer the Court to no judicial precedent announced prior to August, 1987, that reflects the implication of due process in any factual setting at all similar to this one. The source of this shortcoming is apparent. No court ever considered a highway accident as possessed of constitutional significance, at least before this case arose. Standing alone, the complete absence of judicial guidance on the issue precludes claimants' effort to link government rock disposal practices to constitutional infringements, at least to the extent such claims are directed at individuals in their individual capacities.[2] Only when the impact of a specific action on a clearly established right is predictable or apparent, can the

---

[2] Claimants never stated what particular highway department policy or procedure they challenge. For purposes of this discussion, claimants appear to be alleging that some State policy or procedure allowed workers to roll boulders down slopes in the course of roadway maintenance. Even proof that such a policy or procedure were in effect could not provide any basis for the assumption that a predictable constitutional consequence existed, however. Absent an historical basis for expecting a constitutional claim, no individual employee could formulate the requisite intent to face § 1983 damages liability. *See Daniels v. Williams, supra*; and *Martinez v. California*, 444 U.S. 277, 285, 100 S. Ct. 553, 559, 62 L.Ed.2d 481 (1980).

immunity granted in *Harlow* to government workers be overcome. *Mitchell v. Forsythe*, 472 U.S. 511, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985).

Claimants' argument, espoused by Colorado Supreme Court Justice Mullarkey in her special concurrence in part and dissent in part, that their constitutional rights to life, liberty, and freedom of travel were infringed as the result of this accident reflects an incomplete analysis of the issue. For purposes of qualified immunity, the court must inquire not only into the type of harm visited on the claimant, but also upon the specific act of the defendant. This same argument was addressed by this Court in *Anderson v. Creighton* as follows:

> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of 'clearly established' law were to be applied at this level of generality, it would bear no relationship to the objective legal reasonableness that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading.
>
> It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence, more relevant sense: *The contours of the right must be sufficiently clear that a reasonable official would understand that*

> *what he is doing violates that right.* This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful [cite], but it is to say that in the light of pre-existing law the unlawfulness must be apparent. (Emphasis added)

107 S. Ct. at 3039.

While claimants' rights to life, liberty and travel were in a generalized sense violated, the individual third-party defendants could not have known that their conduct in conducting ditch clearing operations would violate those rights. The only case factually bearing any resemblance to this action is *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989), in which the Eighth Circuit Court of Appeals held that a municipality could be held liable under §1983 for having a deliberate policy of not shoring up ditches and then requiring employees to work in them without warning of the dangers. However, *Ruge* is a case involving a public entity defendant, not an individual employee of the entity. *Ruge* was announced after the accident occurred in this case. Moreover, *Ruge* has been explicitly criticized by the Eighth Circuit Court of Appeals, *Dawson v. Milwaukee Housing Authority*, 930 F.2d 1283, 1285-1286 (7th Cir. 1991), and implicitly rejected by this Court in *Collins v. City of Harker Heights, Texas, supra*, by its holding that similar conduct did not implicate 42 U.S.C. § 1983. Therefore, it would have been impossible for defendants to have known that their conduct in ditch clearing operations could violate a clearly established constitutional right.

This Court held in *Mitchell v. Forsythe, supra*, that qualified immunity is an entitlement not to stand trial under certain circumstances and that even such pretrial matters as discovery are to be avoided if possible. *Also see Anderson v. Creighton, supra; Harlow v. Fitzgerald, supra.* This Court also noted in *Anderson v. Creighton, supra*, that one of the purposes of the *Harlow* qualified immunity standard is to protect public officials from the broad ranging discovery that can be

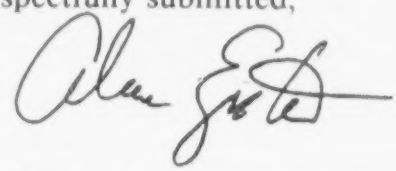
peculiarly disruptive of effective government. For this reason, this Court has emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation. *Anderson v. Creighton*, 107 S. Ct. at 3042, n.6. Since the allegations contained in claimants' third-party complaints do not, as a matter of law, overcome the individual third-party defendants' qualified immunity defense, the Colorado Supreme Court erred in remanding the matter for further hearings in this regard.

CONCLUSION

This case presents a unique and long awaited opportunity for this Court to define where the actions of public employees depart from traditional tort theory and enter the field of 42 U.S.C. § 1983. The Colorado Supreme Court suggests that this is to be measured by the degree of fault alleged against the public employee who has admittedly injured the claimant. If this is the test, then every act resulting in injury becomes, through artful pleading, a recognized claim under § 1983. *Harker Heights* and *Anderson v. Creighton* leave no doubt that this is not the test. Although the "abuse of governmental power" test utilized by the Fifth Circuit was explicitly rejected by this Court in *Harker Heights*, no clearly defined alternative was articulated in its place. Rather, the Court held that "[p]etitioner's claim is analogous to a fairly typical state law tort claim . . . " 112 S. Ct. at 1070. Clearly it is, but why? Until guidance is provided by this Court "fairly typical state law tort claims" such as claimants' here will continue to be misconstrued as torts of Constitutional proportion.

Dated this 20th day of May, 1992.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that on this 20th day of May, 1992 a true and correct copy of the foregoing *PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO* was mailed by placing the same in the United States Mail, postage prepaid, addressed as follows:

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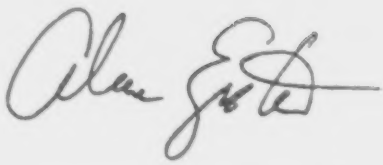

91-1877

(2)

Supreme Court, U.S.
FILED
MAY 22 1992
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER 1991 TERM

THE COLORADO DEPARTMENT OF HIGHWAYS and THE COLORADO DIVISION OF HIGHWAYS, PHILLIP PACHECO, EARMAN PACHECO, MERLE ZIMER, PHILLIP WEST, ROSS HAMILTON, EDWARD FINK, JOHN M. SALAZAR, R.L. CLEVENGER, DWIGHT BOWER, PHIL MCCULLOUGH, and LOWELL JACKSON,

Petitioners,

v.

YVONNE E. DEFOOR, FRANK BOWEN; MARGIE BOWEN; ELINOR M. BUTENHOFF; URS FREI; MICHAEL HATTON; THE ESTATE OF ANNA HAYES, Deceased; THE CHILDREN AND ESTATE OF ARLENE JOHNSON, Deceased; ESTATE OF JOHN KILLEEN, Deceased; ESTATE OF MARKUS LANG, HERBERT LAND, as survivor, heir and personal representative of Markus Lang, and THE ESTATE OF MARKUS LANG, RITA LAND, as survivor, heir and personal representative of Markus Lang and THE ESTATE OF MARKUS LANG, and ELFRIEDE BORRILLO, as Special Administrator of the Estate of Markus Lang; THE ESTATE OF DOUGLAS MACKENZIE, Deceased; SUZANNE MACKENZIE; MICHAEL MCGARVEY, NANCY MCGARVEY; BERNADINE M. REMMERS; CAROL J. SMITH, THOMAS C. SMITH, and MEAGAN N. SMITH, a minor; THE ESTATE OF GLADYS STEWART, Deceased; THE ESTATE OF SOL STEWART, Deceased; THE CHILDREN AND ESTATE OF KEITH WALTERS, Deceased; THE CHILDREN AND ESTATE OF KATHLEEN WALTERS, Deceased; HOROSHI YOSHIOKA; MORDEKHAY FUMISHIKA; MASHASIKI NAKAYAMA; MIKAYO TAJIMA; and RODNEY ALVA WEST; and CLARENDON NATIONAL INSURANCE COMPANY; SAN JUAN TOURS, INC., d/b/a GRAY LINE TOURS; and all persons or entities suffering, or claiming to

[*continued*]

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suffer, damages resultant from the August 10, 1987, collision between a boulder and a Gray Line Tour Bus on U.S. Highway 40, about seven miles east of Winter Park, Colorado, while the bus was on Berthoud Pass,

Respondents,

and

THE STATE OF COLORADO, by and through the Colorado State Claims Board of the Division of Risk Management,

Plaintiff-Appellee,

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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 88CV141, Courtroom 14

ORDER

THE STATE OF COLORADO, by and through the Colorado State Claims Board of the Division of Risk Management,

Plaintiff,

v.

YVONNE E. DEFOOR, *et al.*,

Defendants and Counterclaimants.

and

CLARENDON NATIONAL INSURANCE COMPANY, *et al.*,

Defendants and Counter-Plaintiffs,

v.

THE STATE OF COLORADO, *et al.*,

Defendant.

and

THE COLORADO DEPARTMENT OF HIGHWAYS, *et al.*,

Counterclaim Defendants.

This matter came before the Court on defendants' and counterclaimants' motion for summary judgment, the State of Colorado's motion to dismiss all remaining counterclaims, and third-party defendants and counter-defendants' motion to dismiss all claims alleging civil rights violations under 42 U.S.C. Section 1983. The Court, hereby enters the following findings of fact, conclusions of law, and order:

1. On August 10, 1987, defendants and counterclaimants (claimants) were the passengers in a tour bus travelling on

U.S. Highway 40 (Berthoud Pass), in Grand County, Colorado.

2. At the time, a Colorado State Department of Highway's employee was conducting a ditch-clearing operation, and was using a state owned motor vehicle to move boulders on Berthoud Pass. While moving a 6.7 ton boulder, the state employee pushed it off the side of the mountain. The boulder rolled down onto the roadway, hitting the side of the claimants' tour bus. As a result, nine people were killed and nineteen others were injured.

3. On January 7, 1988, the State of Colorado (the State) filed a complaint for interpleader and for a defendant class action, pursuant to C.R.C.P. Rules 22 and 23. The State asked for leave to deposit the sum of $400,000 into the registry of the court, as the full extent of its liability, under C.R.S. 24-10-101 *et seq.* (1988 Repl. Vol.), the Colorado Governmental Immunity Act (the Act).

4. The Colorado Governmental Immunity Act provides as follows:

> (1) A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort . . . Sovereign immunity is waived by a public entity in an action for injuries resulting from:
>
> (a) The operation of a motor vehicle, owned or leased by such public entity, by a public employee while in the course of his employment. . . .
>
> (d) A dangerous condition of a public highway, road, or street which physically interferes with the movement of traffic. . . . C.R.S. 24-10-106 (1988 Repl. Vol.)

5. After sovereign immunity is waived, the State's liability is limited to $150,000, when one person is injured in an accident. In an accident where more than one person is injured, each claimant's recovery is limited to $150,000, and

the State's total liability per occurrence is limited to $400,000. C.R.S. 24-10-114 (1988 Repl. Vol.)

6. When the General Assembly passed the Colorado Governmental Immunity Act, it made the following findings: (1) That the state of Colorado and its political subdivisions provide essential public services and functions, and unlimited liability for injuries which lie in tort could disrupt or make prohibitively expensive, the government's ability to provide such services and functions; (2) That taxpayers would ultimately bear the fiscal burdens of unlimited liability; therefore limitations were necessary to protect taxpayers against excessive fiscal burdens; and (3) That public employees should be protected from unlimited liability so that they are not discouraged from providing the services or functions required by Colorado's citizens, or from exercising the powers authorized or required by law. C.R.S. 24-10-102 (1988 Repl. Vol.)

7. The legislature also recognized that, in certain cases, the doctrine of governmental immunity was, and would continue to be, inequitable. C.R.S. 24-10-102 (1988 Repl. Vol.)

8. On April 28, 1989, the claimants filed a joint motion for summary judgment claiming that the damage cap provisions of the Act ($150,000 per person, and $400,000 per occurrence), violate their rights to equal protection under the United States and Colorado Constitutions; their rights guaranteeing access to the courts; their substantive due process rights; and their rights to protection from the passage of special legislation.

I. EQUAL PROTECTION

9. The Fourteenth Amendment to the United States Constitution declares that no state shall deny a person equal protection of the law. A similar guarantee exists within Colorado's Constitution's due process clause. Colo. Const. art. II, §25; *Austin v. Litvak*, 682 P.2d 41, 49 (Colo. 1984). An equal protection issue arises when persons who are similarly

situated receive different treatment by the law. *Board of County Commissioners v. Flickinger*, 687 P.2d 975 (Colo. 1984).

10. A court will apply one of three standards of review when a party challenges a statute under the equal protection clause. The first and highest standard is strict scrutiny. It is applied where a "suspect" classification is established, or a fundamental right is involved. *Austin v. Litvak, supra.*

11. Suspect classifications involve unalterable traits, such as race, religion, lineage and alienage. *Everett v. Goldman*, 359 So. 2d 1256, 1266 (La. 1978). The damage cap provisions under the Act do not involve suspect classifications. *Lee v. Colorado Department of Health*, 718 P.2d 221 (Colo. 1986).

12. Fundamental rights include free speech, voting and interstate travel. *Everett v. Goldman, supra.* The weight of authority is that there is no fundamental right to recover an unlimited amount of damages from government entities performing government functions, *Condemarin v. University Hospital*, 775 P.2d 348, 352 (Utah 1989), or to receive full recovery in tort for an injury. *Duke Power Company v. Carolina Environmental Study Group*, 438 U.S. 59, 98 S. Ct. 2620, 57 L.Ed.2d 595 (1978).

13. *But see White v. State of Montana*, 661 P.2d 1272 (Mont. 1983) (right to bring civil action for personal injuries is a fundamental right and subject to strict scrutiny analysis.)

14. Claimants argue that the Act's damage cap provisions infringe on their fundamental rights of interstate travel, and therefore the Court should apply the strict scrutiny test. However, the Court finds that the Act does not create a classification that infringes on the fundamental right to travel. *See Strong v. Collatos*, 450 F. Supp. 1356, 1360 (D. Mass. 1978) (A right which operates to impose some loss, hardship or disadvantage on the exercise of the right to travel may be said to penalize the right; "travel" means migration with the

intent to settle and abide.) Therefore, strict scrutiny is not the proper standard of review.

15. The second standard of review is the intermediate standard. It applies where "quasi-suspect" classes are involved. The United States Supreme Court has applied this standard where classifications are based on alienage and illegitimacy. *Austin v. Litvak, supra* at 49. To date, the Colorado Supreme Court has only applied the intermediate standard of review to gender based classifications. *Austin v. Litvak, supra.*

16. The claimants here argue that the right to compensation for personal injuries is an important constitutional right, and therefore, this court should, at a minimum, apply the intermediate standard of review.

17. The majority of jurisdictions, including Colorado, have refused to apply the intermediate standard of review to legislation limiting damages for personal injuries. *See Lee v. Colorado Department of Health, supra* at 227; *Ryszkiewicz v. City of New Britain*, 479 A.2d 793, 799 (Conn. 1984); *Crowe v. John W. Harton Memorial Hospital*, 579 S.W.2d 888, 892 (Tenn. 1979).

18. *But see Condemarin v. University Hospital*, 775 P.2d 348, 356 (Utah 1989) (statute limiting recovery from uninsured governmental entity reviewable under intermediate standard. Note however that the court applied this standard because "the legislature not only limited recovery, but also extended partial governmental immunity to restrict rights which existed at common law"); *Hanson v. Williams County*, 389 N.W.2d 319, 328 (N.D. 1986) (the right to recover from personal injuries held to be an important substantive right); *Carson v. Maurer*, 424 A.2d 825, 830-31 (N.H. 1980) (medical malpractice statute limiting recovery reviewable under the intermediate standard).

19. This court finds that, in Colorado, the right to recover damages for personal injuries is not reviewable under the intermediate standard.

20. The third standard of review is the "rational basis" test. Under this standard, a classification is valid if it has a rational basis in fact, and bears a rational relationship to legitimate governmental objectives. *Austin v. Litvak, supra* at 49. In 1986, the Colorado Supreme Court ruled that, where a statute limits the amount of damages recoverable from a governmental tortfeasor, the proper standard of review is the rational basis test. *Lee v. Colorado Department of Health*, 718 P.2d 221, 227 (Colo. 1986).

21. Under the rational basis test, a law is presumed to be constitutional and the challenging party must prove beyond a reasonable doubt that the classification is unreasonable, or, if reasonable, is unrelated to any legitimate governmental objective. *Tassian v. People*, 731 P.2d 672 (Colo. 1987).

22. In applying the rational basis test, this Court's limited role is to determine whether there is a reasonable basis upon which the legislature might have acted. *State v. Wilkie*, 261 N.W.2d 434, 442 (Wisc. 1978). A classification does not offend the constitution simply because it is not made with mathematical certainty or because it results in some inequality. *Woods v. Holy Cross Hospital*, 591 F.2d 1164, 1173 (5th Cir. 1979).

23. The majority of states that have considered the equal protection issue have applied the rational basis test, and have ruled that statutes limiting recovery from governmental tortfeasors are constitutional. *See Lienhard v. State of Minnesota*, 431 N.W.2d 861 (Minn. 1988) (statutory classification limiting liability of the state to $100,000 for one claim, and $500,000 for any number of claims arising out of a single occurrence, is rationally related to the legitimate governmental objective of insuring fiscal stability to meet and carry out the manifold responsibilities of government); *Estate of Cargill v. City of Rochester*, 406 A.2d 704 (N.H. 1979) (statute limiting recovery bears a rational relationship to limiting financial burden placed on governmental units by large judgments or high insurance premiums); *Crowe v. John W. Harton*

Memorial Hospital, supra (ordinance limiting amount of damages recoverable against governmental tortfeasors to $20,000 has a rational basis in protecting tax revenues from unlimited claims.)

24. The Court finds that the Act's provisions limiting maximum recovery bear a rational relationship to two legitimate governmental objectives: (1) promoting fiscal certainty; and (2) protecting important governmental services and functions from curtailment or termination.

25. The Court further finds that the claimants have failed to prove the statute unconstitutional beyond a reasonable doubt. Therefore, the Act does not violate the equal protection clauses of the United States or Colorado Constitutions.

II. RIGHT OF ACCESS TO THE COURTS

26. Claimants also argue that the damage cap provisions of the Act violate their rights of access to the courts. Article II, §6 of the Colorado Constitution provides:

> Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should not be administered without sale, denial or delay.

27. When a person claims a right which is not subject to special constitutional protection, such as a fundamental right or a suspect class, that person's access to the courts may be restricted if the restriction bears a rational relationship to a legitimate governmental interest. *Everett v. Goldman, supra* at 1268-69.

28. The majority of courts in other jurisdictions which have considered this issue have held that statutes limiting recovery against governmental tortfeasors do not violate a plaintiff's right of access to the courts. *See Ryszkiewicz v. City of New Britain, supra* (state constitutional provision granting access to courts does not grant unqualified right to recover

unlimited damages from government entities); *Estate of Cargill v. Rochester, supra* (state constitutional provision giving litigants free access to courts to pursue civil remedies "for all injuries" does not guarantee that all injured persons will receive full compensation for their injuries); *Crowe v. John W. Harton Memorial Hospital, supra* (state statute limiting the amount of damages recoverable against governmental tortfeasors to $20,000 does not violate a plaintiff's right of access to the courts.)

29. *But see White v. State of Montana*, 661 P.2d 1272 (Mont. 1983) (statute limiting governmental liability for economic damages and prohibiting recovery for non-economic damages violates Montana's state constitution which guarantees all persons a speedy remedy for every injury.)

30. The Court has already found that the classification contained in the Colorado Governmental Immunity Act bears a rational relationship to legitimate governmental interests. Accordingly, the court also finds that the statutory classification does not violate the claimants' right of access to the courts.

III. SUBSTANTIVE DUE PROCESS

31. Claimants' third argument is that the damage cap provisions of the Act violate their substantive due process rights, and are therefore unconstitutional.

32. A plaintiff has no vested property right in a particular measure of damages, and the legislature possesses broad authority to modify the scope and nature of such damages. *Fein v. Permanente Medical Group*, 695 P.2d 665, 679 (Cal. 1985) *citing to American Bank & Trust Company v. Community Hospital*, 683 P.2d 670 (Cal. 1984).

33. Where legislation involves economic and social welfare interests, the test of substantive due process is whether the regulation is reasonable in relation to the goals sought to

be attained and was adopted in the interest of the community as a whole. *Sibley v. Board of Supervisors of Louisiana*, 462 So. 2d 149 (La. 1985).

34. A law violates the substantive due process guaranty only when there is a totally arbitrary deprivation of liberty. *Woods v. Holy Cross Hospital*, 591 F.2d 1164 (5th Cir. 1979). Where a statute provides that an injured person may apply to the court for relief only within a limited period of time, there is no violation of due process. *Oberst v. Mays*, 365 P.2d 902, 905 (Colo. 1961).

35. The legislation here bears a rational relation to legitimate governmental objectives. Therefore, the damage cap provisions do not violate the claimants' rights to substantive due process.

36. *See Jetton v. Jacksonville Electric Authority*, 399 So. 2d 396 (Fla. App. 1981) (statute imposing $50,000 limit on governmental tort liability does not violate substantive due process of the law.) *See also Sibley v. Board of Supervisors of Louisiana, supra* (statute limiting medical malpractice awards to $500,000 does not violate due process clauses.)

IV. SPECIAL LEGISLATION

37. Claimants' final argument is that the Act constitutes special legislation and is therefore unconstitutional.

38. Article V, Section 25 of the Colorado Constitution provides:

> The general assembly shall not pass . . . special laws . . . granting to any corporation, association, or individual any special or exclusive privilege, immunity or franchise whatsoever.

39. A statute is not special legislation where it is general and uniform in its operation upon all those in like situations. *Bushnell v. Sapp*, 571 P.2d 1100 (Colo. 1977).

40. The Colorado Governmental Immunity Act applies uniformly to all persons who sue governmental tortfeasors, and does not single out certain groups for special treatment. Therefore, the statute does not constitute special legislation. *See Giebink v. Fischer*, 709 F. Supp. 1012 (D. Colo. 1989) (premises liability statute applies uniformly to all landowners to limit liability for injuries, and therefore is not a special law.)

V. THE ROLE OF THE TRIAL COURT

41. This court is aware that some claimants have sustained injuries and damages in excess of the statutory limits, and the damage cap provisions of the Colorado Governmental Immunity Act will create severe financial hardships for these claimants and their families. Since the State has not claimed that these claimants were in any way responsible for the calamity, this result may seem inequitable. Nevertheless, when the language of a statute is plain and unambiguous, the Court must apply the statute as written. *Lee v. Colorado Department of Health, supra.*

42. It is not within this Court's power to rewrite legislation. The power to change the present scheme of compensation or to provide an alternative remedy for these and other claimants rests with the General Assembly. *Bellendir v. Kezer*, 648 P.2d 645 (Colo. 1982).

43. Nor can this Court interpret the Act using the standards suggested by claimants' counsel. Only four years ago, the Colorado Supreme Court upheld the constitutionality of the Colorado Governmental Immunity Act against another party's analogous claim that the Act violated his right to equal protection. This Court is bound by that precedent. *Lee v. Colorado Department of Health, supra.*

VI. CIVIL RIGHTS CLAIMS

44. Claimants have already conceded that no claim may be stated against the individual defendants in their official capacities. *Will v. Michigan Department of State Police*, 107 S. Ct. 2304 (1989). The final issue is whether these claimants have stated claims sufficient to expose the individual defendants to potential civil rights liability in their individual capacities. The Court concludes that plaintiffs have not stated such claims and hereby incorporates by reference the arguments made in the briefs submitted by the State of Colorado and by third-party defendants and counter-defendants.

ORDER

WHEREFORE, IT IS ORDERED that defendants' and counterclaimants' motion for summary judgment as to the constitutionality of C.R.S. 24-10-101 *et seq.* is denied; the Court declares that said statute is constitutional; and

IT IS FURTHER ORDERED that the plaintiff State of Colorado's motion to dismiss all counterclaims alleged against it is granted; and

IT IS FURTHER ORDERED that third-party defendants and counter-defendants' motion to dismiss all claims alleging civil rights violations under 42 U.S.C. Section 1983 is granted; and

IT IS FURTHER ORDERED that this matter shall proceed as an interpleader action; and

IT IS FURTHER ORDERED that this Order shall constitute a final judgment for appellate purposes, the court finding no just reason for delay. C.R.C.P. Rule 54 (b).

Dated this 27th day of July, 1990.

BY THE COURT:

Sandra I. Rothenberg
District Court Judge

SIR/cwf
cc: All counsel

COLORADO BAR ASSOCIATION
ADVANCE SHEET HEADNOTE
February 3, 1992

No. 90SA351. *State v. DeFoor. Statutory Limitations on Damages — Sovereign Immunity — Equal Protection of Laws — Due Process of Laws — Access to Courts — § 1983.*

The supreme court holds that the statutory limitation on damages in section 24-10-114(1), 10A C.R.S. (1988), sought against the State withstands equal protection, due process and access to court challenges. The supreme court also finds that dismissal of the § 1983 claims was premature on the facts, and thus reinstates and remands the claims for further hearing.

No. 90SA351

Supreme Court, State of Colorado

FEBRUARY 3, 1992

THE STATE OF COLORADO, by and through the Colorado State Claims Board of the Division of Risk Management,

Plaintiff-Appellee,

v.

YVONNE E. DEFOOR; FRANK BOWEN; MARGIE BOWEN; ELNOR M. BUTENHOFF; URS FREI; MICHAEL HATTON; THE ESTATE OF ANNA HAYES, Deceased; THE CHILDREN AND ESTATE OF ARLENE JOHNSON, DECEASED; ESTATE OF JOHN KILLEEN, Deceased; ESTATE OF MARKUS LANG, HERBERT LAND, as survivor, heir and personal representative of Markus Lang, and THE ESTATE OF MARKUS LANG, RITA LAND, as survivor, heir and personal representative of Markus Lang and THE ESTATE OF MARKUS LANG, and ELFRIEDE BORRILLO, as Special Administrator of the Estate of Markus Lang; THE ESTATE OF DOUGLAS MACKENZIE, Deceased; SUZANNE MACKENZIE; MICHAEL MCGARVEY, NANCY MCGARVEY; BERNADINE M. REMMERS; CAROL J. SMITH, THOMAS C. SMITH, and MEAGAN N. SMITH, a minor; THE ESTATE OF GLADYS STEWART, Deceased; THE ESTATE OF SOL STEWART, Deceased; THE CHILDREN AND ESTATE OF KEITH WALTERS, Deceased; THE CHILDREN AND ESTATE OF KATHLEEN WALTERS, Deceased; HOROSHI YOSHIOKA; MORDEKHAY FUMISHIKA; MASHASIKI NAKAYMA; MIKAYO TAJIMA; and RODNEY ALVA WEST; and CLARENDON NATIONAL INSURANCE COMPANY; SAN JUAN TOURS, INC., d/b/a GRAY LINE TOURS; and all persons or entities suffering, or claiming to suffer, damages resultant from the August 10, 1987, collision

[*Continued*]

between a boulder and a Gray Line Tour Bus on U.S. Highway 40, about seven miles east of Winter Park, Colorado, while the bus was on Berthoud Pass,

Defendants-Appellants,

v.

THE COLORADO DEPARTMENT OF HIGHWAYS and THE COLORADO DIVISION OF HIGHWAYS, PHILLIP PACHECO, EARMAN PACHECO, MERLE ZIMMER, PHILLIP WEST, ROSS HAMILTON, EDWARD FINK, JOHN M. SALAZAR, R.L. CLEVENGER, DWIGHT BOWER, PHIL MCCULLOUGH, and LOWELL JACKSON,

Third-Party Defendants and Counter Defendants-Appellees.

Appeal from the District Court, City and County of Denver, Honorable Sandra I. Rothenberg, Judge

EN BANC

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CASE REMANDED WITH DIRECTIONS

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JUSTICE VOLLACK delivered the Opinion of the Court as to Parts I, II, III, and V, and announced the Judgment of the Court as to Part IV.

CHIEF JUSTICE ROVIRA specially concurs as to Part IV, and JUSTICE LOHR joins in the special concurrence.

JUSTICE MULLARKEY specially concurs as to Part V and dissents as to Part II, and JUSTICE QUINN joins in the special concurrence as to Part V.

JUSTICE QUINN dissents as to Part IV, and JUSTICE MULLARKEY joins in the dissent.

Claimants appeal from a district court ruling that the Colorado Governmental Immunity Act, §§ 24-10-101 to -120, 10A C.R.S. (1988) (the Act), does not violate claimants' rights to equal protection of laws, access to courts, or due process of laws.[1] Claimants also appeal from the district court's determination that their claims against individual defendants under 42 U.S.C. § 1983 (1988) were insufficient to expose those defendants to liability. We affirm the district court ruling regarding claimants' constitutional challenges, but remand the § 1983 allegations for further hearings.

I.

On August 10, 1987, Phillip Pacheco was operating a state-owned vehicle. He used this vehicle to move a 6.7-ton boulder, pursuant to Department of Highway ditch-clearing policies, on an upper switchback on the west side of Berthoud Pass. The boulder rolled down onto a roadway and hit a tour bus. Of the thirty-four passengers on the bus, nine were killed and twenty-five sustained injuries as a result of the collision.

On January 6, 1988, the Colorado Attorney General filed an interpleader action in Denver District Court. The Attorney General attempted to deposit the sum of $400,000 with the registry of the Court, and to have a defendant class certified pursuant to C.R.C.P. 22 and 23. On April 28, 1989, the claimants filed a motion for summary judgment, contending that section 24-10-114(1), 10A C.R.S. (1988), of the Act violated their right to equal protection of laws, access to

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[1] This court has jurisdiction pursuant to § 13-4-102(1)(b), 6A C.R.S. (1988), as claimants contest the constitutionality of § 24-10-114(1). Claimants were the named defendants in an interpleader action filed by the State of Colorado on January 6, 1988. Claimants are the appellants before this court.

courts and due process of laws.[2] Section 24-10-114(1) provides:

> (1) The maximum amount that may be recovered under this article in any single occurrence, whether from one or more public entities and public employees, shall be:
>
> > (a) For any injury to one person in any single occurrence, the sum of one hundred fifty thousand dollars;
> >
> > (b) For an injury to two or more persons in any single occurrence, the sum of four hundred thousand dollars; except that, in such instance, no person may recover in excess of one hundred fifty thousand dollars.

The claimants also made claims pursuant to 42 U.S.C. § 1983 (1988). The State filed its own motion for summary judgment and moved to dismiss the § 1983 claims. The district court ruled against the claimants and in favor of the State on the motions for summary judgment.

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[2] Claimants also contended that the Act violated the constitutional prohibition against special legislation. That contention was not raised on appeal to this court.

II.

Claimants urge that section 24-10-114(1), 10A C.R.S. (1988), violates their right to equal protection of the laws because it creates an arbitrary classification. Some individuals, according to claimants, may be fully compensated for injuries they sustain alone. Others jointly injured, however, may not be. Claimants further contend that the recovery limitations in the Act violate their right to equal protection of the laws because the limitations are not rationally related to the State's interest in assuming liability for its tortious acts. Claimants premise their argument on the equal protection guarantees found in the Fourteenth Amendment to the United States Constitution and in Article II, Section 25, of the Colorado Constitution.

Claimants' argument raises the larger issue of whether the General Assembly can ever limit the State's liability for damages in tort, as any limitation will work favorably for some but not others. We have recognized, however, that it is within the province of the General Assembly to simultaneously create governmental liability and place limitations on actions brought against the State. *See, e.g., Evans v. Board of County Comm'rs*, 174 Colo. 97, 482 P.2d 968 (1971) (abrogating sovereign immunity in Colorado). We conclude that the General Assembly can limit the State's liability for damages and affirm the district court's ruling that the Act does not violate the claimants' right to equal protection of the laws.

A. Arbitrary Classification

Claimants contend that section 24-10-114(1) creates an arbitrary and irrational classification between individuals who may potentially receive full compensation under subsection (1)(a) as opposed to individuals who are less likely to receive full compensation for injuries under subsection (1)(b).[3] Claimants further contend that their right to recover damages for personal injuries is important, and that section

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[3] Claimants argue that § 24-10-114(1) creates additional, impermissible classifications. First claimants contend that § 24-10-114(1) irrationally separates victims of private tortfeasors from victims of public tortfeasors. We rejected this contention in *Lee v. Colorado Department of Health*, 718 P.2d 221, 227-28 (Colo. 1986). Secondly, claimants contend that § 24-10-114(1) irrationally compensates victims of torts in 1979 differently than victims of torts in 1991, given the rate of inflation. This court rejected a similar argument in *Bellendir v. Kezer*, 648 P.2d 645, 647 (Colo. 1982). In *Bellendir*, we held:

> In determining that the absence of an escalation of benefits provision applicable to individuals in the plaintiff's position violates no constitutional guarantee, we do not mean to indicate that the present statute necessarily best fulfills the social and economic objectives it was designed to achieve or that a more just system could not be formulated . . . However, it is not the function of this Court to rewrite legislation; the power to change the present scheme rests with the General Assembly.

Id. We thus decline to invalidate § 24-10-114(1) on such grounds.

Finally, claimants contend that § 24-10-114(1) irrationally separates victims of torts from victims of breaches of contracts. This contention is without merit as contracts are the product of intentional acts for which public entities can accurately plan and budget. *See, e.g., Faber v. State*, 143 Colo. 240, 241, 353 P.2d 609, 609-10 (1960) (distinguishing *Boxberger v. State Highway Dep't*, 126 Colo. 438, 250 P.2d 1007 (1952), and *Ace Flying Serv. Inc. v. Colorado Dep't of Agric.*, 136 Colo. 19, 314 P.2d 278 (1957), as cases involving actions on contracts wherein persons dealing with the state are entitled to enforce their contract rights, from cases premised on the state's negligence.)

24-10-114(1) should thus be reviewed under a heightened scrutiny equal protection test.[4]

This court previously declined to apply a heightened scrutiny test to an equal protection attack on section 24-10-

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[4] This court has previously detailed the analytical framework for addressing equal protection challenges. *See e.g., Tassian v. People*, 731 P.2d 672, 674-75 (Colo. 1987). While neither party contends that strict scrutiny should be applied to § 24-10-114(1), claimants ask this court to follow the jurisprudence of the Utah Supreme Court and the New Mexico Supreme Court in their recent application of an intermediate standard of review to equal protection attacks on statutory damage limitations. *See Trujillo v. City of Albuquerque*, 798 P.2d 571, 577-78 (N.M. 1990), and *Condemarin v. University Hospital*, 775 P.2d 348, 352-56 (Utah 1989).

The Utah Supreme Court considered the constitutionality of damage limitations in a medical malpractice action brought against a state university hospital in *Condemarin*. When the plaintiff brought her action, government-owned health care facilities were immunized from suits by a governmental immunity act. Thus, the *Condemarin* court was required to evaluate the doctrine of sovereign immunity with respect to health care services. The *Condemarin* court considered the plaintiff's inability to bring suit and concluded that a heightened standard of review should be applied because "the legislature has not only limited recovery, but it has also extended partial governmental immunity to restrict rights which existed at common law." *Id.* at 356. We are not called upon here to evaluate partial governmental immunity and, under our holding in *Lee*, we decline to follow the *Condemarin* court.

The New Mexico Supreme Court held that damage limitations should be reviewed under intermediate scrutiny because "[a] tort victim's interest in full recovery of damages calls . . . for a form of scrutiny somewhere between 'the largely toothless invocation of minimum rationality and the nearly fatal invocation of strict scrutiny.' " *Trujillo*, 798 P.2d at 578 (citations omitted). The *Trujillo* court, however, declined to pass on the constitutionality of the damage limitations at issue. We decline to follow the jurisprudence of the *Trujillo* court because we do not recognize a right to full recovery for damages, nor do we view (as claimants concede) the rational basis inquiry to be 'largely toothless.' *See, e.g., Austin v. Litvak*, 682 P.2d 41, 50 (Colo. 1984) (a legislative classification failed under a rational basis test); and *Gallegos v. Phipps*, 779 P.2d 856 (Colo. 1989) (statute failed to pass rational basis test).

114(1) and applied a rational basis test instead, in *Lee v. Colorado Department of Health*, 718 P.2d 221, 227 (Colo. 1986) (a rational basis test applies where no fundamental right is infringed nor suspect class created). *See also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83 (1978) (liability limitations are classic examples of economic regulation which is subject to rational basis review) (quoted in *Austin v. Litvak*, 682 P.2d 41, 50 (Colo. 1984)). Pursuant to *Lee*, we again apply a rational basis test to the instant equal protection attack on section 24-10-114(1).

B. Rational Basis Review

Under the rational basis test, section 24-10-114(1) is presumed constitutional and can create a classification that affords disparate treatment to different groups only if it is rationally related to a legitimate state interest.[5] *Tassian v. People*, 731 P.2d 672, 675 (Colo. 1987). We begin our analysis with a review of the State's liability for injuries caused by the negligent operation of state-owned motor vehicles.

In 1949, the General Assembly enacted a statute that rendered the State liable for injuries caused by the tortious

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[5] The rational basis test places the burden of proof on the party challenging the statute's constitutionality. The challenger must prove beyond a reasonable doubt that the classification is unreasonable, or that it is unrelated to any legitimate state interest. *Lee*, 718 P.2d at 227; *Tassian v. People*, 731 P.2d 672, 675 (Colo. 1987). The statute is afforded a presumption of constitutionality at the outset of the inquiry. *Tassian*, 731 P.2d at 675. *See also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83 (1978).

operation of certain classes of state-owned motor vehicles.[6] Act approved May 6, 1949, ch. 118, sec. 1, 1949 Colo. Sess. Laws 268-69; *see also* §§ 13-10-1 to -3, 2 C.R.S. (1953). The General Assembly simultaneously limited the State's liability for such damages as follows:

> (a) Bodily injury liability, Ten Thousand and No/100 ($10,000.00) Dollars for each person, Twenty Thousand and No/100 ($20,000.00) Dollars for each accident.
>
> (b) Property damage liability, Five Thousand and No/100 ($5,000.00) Dollars for each accident.

Id. at 268. When enacting these sections, the General Assembly declared that the Act was necessary for "the immediate preservation of the public peace, health and safety." *Id.* at 269.

In 1968, the legislative council of the General Assembly appointed a committee to study sovereign immunity in Colorado. *See* Legislative Council Report to the Colorado General Assembly, *Governmental Liability in Colorado*, Research Publication No. 134 (Nov. 1968) [hereinafter "Legislative Council Report"]. The committee reviewed the extent of the State's liability in numerous areas, including liability for injuries related to roads, highways and negligent operation of

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[6] Section (1) of the Act provided:

> In case any injury to the person or property of another is caused by the tortious operation of a motor vehicle by a state, county, municipal or quasi-municipal police, fire or health department while engaged in the line of duty, the state, county, municipality or quasi-municipality and the motor vehicle drivers thereof shall be liable for such injury to the extent hereinafter stated[.]

Act approved May 6 1949, ch. 118, sec. 1, 1949 Colo. Sess. Laws 268.

The General Assembly did not choose to include liability for injuries caused as a result of highway construction or maintenance at that time. *See e.g.*, § 120-7-13, 6 C.R.S. (1963).

motor vehicles.[7] The committee also reviewed both the amount and nature of claims filed with the State from July 28, 1965, through September 5, 1967. *Id.* at 46-48. The committee analyzed "the practical fiscal considerations which might foreseeably flow from any enlargement of tort responsibility." *Id.* at 143.

On two different occasions, the committee met for the purpose of discussing the fiscal impact of purchasing government liability insurance. *Id.* at 144. In proposing approaches to legislation regarding governmental liability, the committee anticipated the equal protection issue currently before this court:

> [I]t is said that any dollar limitation is arbitrary and bound to be unfair to some claimants since such limits will usually have no rational relationship to the amount of actual damages sustained. On the other hand, this approach does eliminate to a considerable degree the danger of the catastrophe judgment, and provides a sound basis for rational fiscal planning and the computation of insurance premiums.

Id. at 119.[8] The committee was thus aware that any recovery limitation might not satisfy all claims equally. The committee noted that limiting recovery, however, provided "a sound basis for rational fiscal planning and the computation of insurance premiums." *Id.* In their report submitted to the General Assembly, the committee concluded that limiting

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[7] At the time of the report, nineteen states (including Colorado) were liable in damages for injuries caused by the negligent operation of certain classes of motor vehicles. Legislative Council Report at 60 and 71; *see, e.g.*, § 13-10-1, 2 C.R.S. (1963).

[8] The comment appeared as a criticism of a proposal to limit liability to the amount of insurance coverage. At the time of the report, twenty-five states had authority to purchase liability insurance. Fourteen of those twenty-five states permitted recovery to the extent of insurance coverage. Legislative Council Report at 72.

liability was the best alternative to either no liability or unlimited liability. *Id.* at 144-45.

In March of 1971, this court considered and rejected the draconian doctrine of sovereign immunity in *Evans v. Board of County Commissioners*, 174 Colo. 97, 482 P.2d 968 (1971) (plaintiff sued for damages sustained after she fell on courthouse steps) In rejecting the doctrine, we held:

> The effect of this opinion . . . is simply to undo what this court has done and leave the situation where it should have been at the beginning . . . : in the hands of the General Assembly of the State of Colorado. If the General Assembly wishes to restore sovereign immunity . . . in whole or in part, it has the authority to do so. If the legislative arm of our government does not completely restore these immunities, then undoubtedly it will wish to place limitations upon the actions that may be brought against the state and its subdivisions. This, too, it has full authority to accomplish.

Id. at 105, 482 P.2d at 972 (citations omitted).[9]

In May of the same year, the General Assembly exercised this authority and created governmental liability in numerous areas, including highway maintenance, while simultaneously limiting recovery for liability to $100,000 per person and $300,000 per occurrence.[10] Act approved May 22, 1971, ch. 323, sec. 1, 1971 Colo. Sess. Laws 1204-11; § 130-

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[9] We announced our decision in *Evans* along with our decisions in *Flournoy v. School District Number One*, 174 Colo. 110, 482 P.2d 966 (1971), and *Proffitt v. State*, 174 Colo. 113, 482 P.2d 965 (1971). These cases have been superseded by statute as stated in *State v. Hartsough*, 780 P.2d 836 (Colo. 1990).

[10] The committee recommended setting recovery limits at $100,000 per person/$3,000,000 per occurrence. Legislative Council Report at 145. During deliberations, Representative Sack motioned, however, to establish the per-occurrence limit at $300,000, and the draft bill was accordingly amended on February 24, 1971.

11-14, 6 C.R.S. (1971 Supp.); *see, e.g., State v. Hartsough*, 790 P.2d 836, 837-38 (Colo. 1990). In 1979, the General Assembly approved sections 24-10-114(1)(a) and (b), which increased the liability limits to their current values—$150,000 per person and $400,000 per occurrence. Act approved June 15, 1979, ch. 219, sec. 4, 1979 Colo. Sess. Laws 863.

The General Assembly has thus rendered the State of Colorado liable for actions arising out of negligent operation of state-owned motor vehicles for forty-two years. Recovery has been limited since such actions were created in 1949. As the State's exposure has generally grown since 1949, the limits on liability have correspondingly been raised, in 1971 and again in 1979. Thus the monetary limits on the State's liability remained the same from 1949 through 1971, from 1971 through 1979, and from 1979 through the present. The General Assembly acted rationally during this period, when adjusting the State's liability to its monetary ability to assume such fiscal responsibilities.

C. State Interests

In evaluating the state interests involved, we look to those interests invoked by section 24-10-114(1) and by the Act generally. Section 24-10-114(1) provides monetary recovery for governmental liability created by the Act. In the Act's declaration of policy, the General Assembly recognized this court's abrogation of sovereign immunity and joined in our conclusion that the doctrine of sovereign immunity frequently produced unjust results. § 24-10-102, 10A C.R.S. (1988); *Evans*, 174 Colo. at 101, 482 P.2d at 970. The General Assembly stated, however, "that unlimited liability could disrupt or make prohibitively expensive the provision of . . . essential public services and functions." § 24-10-102. The

General Assembly also noted that "the taxpayers would ultimately bear the fiscal burdens of unlimited liability."[11] *Id.*

Claimants argue that section 24-10-114(1) is not rationally related to the enumerated state interests for the following reasons: because the recovery limits were arbitrarily chosen; because the scheme denies full recovery where government liability is potentially greatest; because the limits have not been raised since 1979; because there is no evidence of financial hardship to the community; and, because the amount of claims paid is not substantial. We reject claimants' contentions.

In *Evans v. Board of County Commissioners*, 174 Colo. 97, 482 P.2d 968 (1971), we abrogated the doctrine of sovereign immunity and returned to the legislature the authority to regulate the State's liability. *Id.* at 105, 482 P.2d at 972. Prior to our decision in *Evans*, the legislative council carefully considered the extent to which the State could afford liability insurance. Responding to both our decision in *Evans* and the Legislative Council Report, the General Assembly exercised its authority and abrogated sovereign immunity in 1971, while simultaneously establishing recovery limits. The General Assembly raised the recovery limits eight years later.

We have previously rejected an equal protection challenge to section 24-10-114(1) in *Lee v. Colorado Department of Health*, 718 P.2d 221, 227-28 (Colo. 1986). We noted that the State had an interest in creating fiscal certainty in order to execute its myriad public responsibilities. *Id.* at 227. We did not hesitate to conclude that

> [b]y limiting the liability of a public entity to a fixed amount, the Governmental Immunity Act protects

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[11] Section 24-10-113(3) of the Act provides that when public entities are unable to pay judgments during the fiscal year, the entities "shall levy a tax, in a separate item to cover such judgment." § 24-10-113(3), 10A C.R.S. (1988). Public entities are required to levy such taxes until outstanding judgments are satisfied. *Id.*

> the public entity against the risk that unforeseen and unlimited tort judgments will deplete the public coffers and result in the termination or substantial curtailment of important governmental functions.

Id. at 228. We found that section 24-10-114(1) satisfied equal protection of the laws. *Id.* at 228.

Claimants concede that their claim, the multi-person incident, is the rare exception and not the rule. Their claim thus presents the extreme case where a particular request for relief is not completely fulfilled as a result of limited liability. As the United States Supreme Court has said,

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because ' . . . in practice, it results in some inequality.'

Dandrige v. Williams, 397 U.S. 471, 485 (1970), *quoted in Bellendir v. Kezer*, 648 P.2d 645, 647 (1982).[12] We find that section 24-10-114(1) is rationally related to the legitimate state interests of fiscal solvency and provision of essential services while minimizing taxpayer burdens. Accordingly, we affirm the district court's holding that claimants are not deprived of their right to equal protection of the laws.

III.

Claimants next contend that section 24-10-114(1), 10A C.R.S. (1988), deprives them of access to courts guaranteed

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[12] *See also Duke Power*, 438 U.S. at 86 (Limiting liability "will, of necessity, be arbitrary in the sense that any choice of a figure based on imponderables like those at issue here can always be so characterized. This is not, however, the kind of arbitrariness which flaws otherwise constitutional action.").

by Article II, Section 6, of the Colorado Constitution because the statute denies them an adequate remedy for their injuries. We disagree.

Article II, Section 6, of the Colorado Constitution provides:

> Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.[13]

This provision protections *initial* access to the courts. *Torres v. Portillos*, 638 P.2d 274, 277 (Colo. 1981).[14] The right of access is conditioned on the existence of a legal right under law to seek redress from another. When a right accrues under law, courts must be available to effectuate that right. *Protect*

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[13] Once again, claimants ask this court to follow the jurisprudence of the Utah Supreme Court and the New Mexico Supreme Court in their recent analyses of whether damage limitations burden litigants' access to courts. *See Trujillo v. City of Albuquerque*, 798 P.2d 571 (N.M. 1990), and *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989).

Under the Utah Governmental Immunity Act, the defendants in *Condemarin* were immune from suit. Thus, the plaintiff was deprived of her *initial* access to the courts. Unlike the *Condemarin* plaintiff, claimants in the present case are not deprived of their opportunity to sue the State. Thus they are not similarly deprived of their access to the courts.

The New Mexico Supreme Court considered whether damage limitations violated litigants' access to courts in *Trujillo*. The *Trujillo* court opined that an intermediate level of scrutiny should apply to statutes burdening access to courts, but declined to pass on the constitutionality of the damage limitations. We do not need to address what level of scrutiny should apply to restrictions on access to courts, as we find no access restricted in the present case.

[14] In *Torres*, we evaluated § 38-12-103(3)(a), 3 C.R.S. (1973), which allows landlords, but not tenants, to recover attorney fees in § 38-12-103(3)(a) actions. We held that the tenants' lack of equal opportunity to recover attorney fees did not deny initial access to the courts and therefore did not contravene Article II, § 6. *Torres*, 638 P.2d at 277.

Our Mountain Env't, Inc. v. District Court, 677 P.2d 1361, 1367 n.6 (Colo. 1984) (the federal constitutional right to petition the government for a redress of grievances includes access to the courts) (citing *Hurricane v. Kanover, Ltd.*, 651 P.2d 1218 (Colo. 1982), and *O'Quinn v. Walt Disney Prods., Inc.*, 177 Colo. 190, 493 P.2d 344 (1972)); *see also Curtiss v. GSX Corp.*, 774 P.2d 873, 876 (Colo. 1989) (rejecting a tort claim where a statute immunized an employer from lawsuits brought by an employee for work-related injuries).

Claimants contend that section 24-10-114(1) violates their right to open courts because it denies them an adequate remedy. Article II, Section 6, however, does not purport to control the scope or substance of remedies afforded to Colorado litigants. The open courts guarantee rather assures litigants "that courts of justice shall be open to every person and a speedy remedy afforded for every injury." *Curtiss*, 774 P.2d at 876.

Claimants alternatively contend that the legislature severely curtailed a remedy without providing an adequate alternative, contrary to the requirements of *Kandt v. Evans*, 645 P.2d 1300 (Colo. 1982).[15] In *Kandt*, we considered whether a plaintiff's right of access to the courts was violated when she was precluded from filing an intentional tort action

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[15] Claimants contend that they are entitled to an adequate remedy under *Boxberger v. State Highway Department*, 126 Colo. 438, 250 P.2d 1007 (1952), wherein we stated that "[t]he rights of a citizen remain the same whether they collide with an individual or the government." *Id.* at 1008. In *Boxberger*, we were concerned with a plaintiff's ability to sue the State Highway Department. The plaintiff had executed and delivered a deed granting access rights to a portion of his farm to the Department, but never received any consideration. We concluded that the district court erred in dismissing plaintiff's action.

Like *Kandt*, *Boxberger* is readily distinguishable from the instant case as the claimants' ability to file suit against the State is not in dispute. Further, the instant case does not involve a dispute regarding contract rights, as did *Boxberger*. Thus, *Boxberger*'s directive does not resolve the issue before this court.

against a co-employee under the Colorado Worker's Compensation Act. *Kandt*, 645 P.2d at 1306. We held that the General Assembly could abrogate common law rights as long as an adequate statutory remedy was supplied, and concluded that there was no access to courts violation.

Claimants do not contend that the General Assembly has eliminated a right to an *adequate* remedy that existed at common law, nor do they now dispute their ability to file suit against the State. We do not find *Kandt* to govern the present case. Because the access to courts guarantee does not address adequacy of remedy, we conclude that claimants have not been deprived of their access to courts.

IV.

Claimants contend that section 24-10-114(1), 10A C.R.S. (1988), deprives them of their rights to substantive due process under the Fourteenth Amendment to the United States Constitution and under Article II, Section 25, of the Colorado Constitution. We disagree.

The due process guarantee of the Colorado Constitution provides that "[n]o person shall be deprived of life, liberty or property, without due process of law." Colo. Const., art. II, § 25.[16] We have observed that "[t]he constitutional provision pertaining to due process of law is applicable to rights, not remedies." *White v. Ainsworth*, 62 Colo. 513, 522, 163 P. 959, 962 (1917) (a party has no vested right in a remedy) (citing 6 *Am. & Eng. Ency. of Law* 947 (2d ed.)). The United States Supreme Court has similarly observed that

> although a vested cause of action is property and is protected from arbitrary interference, [appellants have] no property, in the constitutional sense, in any

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[16] The Fourteenth Amendment to the United States Constitution similarly provides, in pertinent part: "No State . . . shall deprive any person of life, liberty, or property, without due process of law. . . . "

> particular form of remedy; all that [they are] guaranteed by the Fourteenth Amendment is the preservation of [their] substantial right to redress by some effective procedure.

Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933) (citations omitted). Thus, the federal and state due process guarantee does not give litigants rights to particular remedies.[17] Claimants argue that they have a legal right to damages for their injuries that is a property right which cannot be taken away without due process of law. Claimants rely on *Rosane v. Senger*, 112 Colo. 363, 149 P.2d 372 (1944), for the proposition that the right to damages for injuries constitutes property subject to the protections of the due process guarantee. The plaintiff in *Rosane* contested whether the district court erred in finding that her medical malpractice action was barred by a statute of limitations. We said that "[a] legal right to damage for an injury is property and one can not [sic] be deprived of his property without due process. There can be no due process unless the party deprived has his day in court." *Id.*at 370, 149 P.2d at 375. Plaintiff's property right to damages was thus effectuated by preserving her cause of action for damages. *Id.* at 370, 149 P.2d at 375-76. We accordingly found that her action was not barred by the statute of limitations. *Id.*

Claimants' contention equates rights to causes of action to rights to a specific remedy under section 24-10-114(1). Section 24-10-114(1) was enacted as part of the General Assembly's response to our abrogation of sovereign immunity. *Evans v. Board of County Comm'rs*, 174 Colo. 97, 482 P.2d 968 (1971). In *Evans*, we invited the General Assembly to recreate governmental immunity as it saw fit, in whole or in part. *Id.* at 105, 482 P.2d at 972. The General Assembly created a statutory scheme whereby claimants with rights to

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[17] The United States Supreme Court held, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82 (1978), that liability limitations found in the Price-Anderson Act did not violate the due process guarantee in the Fourteenth Amendment.

particular causes of action can seek *limited* recovery against the State. *See generally* § § 24-10-101 to -120, 10A C.R.S. (1988). Section 24-10-114(1), as part of this scheme, is a limited remedial statute; it supplies a carefully defined range of remedies for causes of action created under other sections of the Act. It does not create a right to a specific dollar remedy.

Claimants' substantive due process claim to recover an amount in excess of the statutory scheme would set the unwarranted precedent that the State's liability is limited only when the particular plaintiffs are satisfied with the compensation received. The principles of limited liability, however, do not turn on the facts of particular cases.

We conclude that because there is no right to a remedy, claimants have failed to articulate a cognizable property interest in support of their due process claim.

Claimants alternatively contend that the due process guarantee incorporates claimants' right of access to courts which in turn requires a *quid pro quo*, or adequate, alternative remedy.[18] Claimants' alternative contention fails for the above-discussed reason: it fails to articulate a cognizable property interest. We thus conclude that section 24-10-114(1) does not deprive claimants of their rights to substantive due process of laws.

V.

Finally, claimants contend that the district court erred in dismissing their § 1983 claims against individual defendants

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[18] Whether such a right exists is an unresolved question with respect to federal law. The *Duke Power* Court stated that "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." *Duke Power*, 438 U.S. at 88.

for failure to state claims sufficient to expose the individual defendants to civil rights liability.[19] We agree.

In order to state a claim for relief under § 1983, a plaintiff must allege that a defendant acted under color of state law and that the defendant's action deprived the plaintiff of a right secured by the federal constitution or federal laws. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). Courts must then determine whether such rights have been violated by applying substantive federal law that defines the requisite state of mind and the other requirements for pleading a civil rights action. *Daniels v. Williams*, 474 U.S. 327, 330 (1985); *Baker v. McCollan*, 443 U.S. 137, 140 (1979); Sheldon Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 3.02. 141 (3d ed. 1991). Finally, the defendant can assert qualified immunity defenses to defeat a § 1983 claim. *Hafer v. Menlo*, ____ U.S. ____, 112 S. Ct. 358 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989); *Anderson v. Creighton*, 483 U.S. 635 (1987).

Noting that parties "against whom summary judgment is sought [are] entitled to the benefit of all favorable inferences that may be drawn from the facts," *Churchey v. Adolph Coors Company*, 759 P.2d 1336, 1339-40 (Colo. 1988) (citations omitted), we are not convinced that there was no genuine issue of material fact with respect to claimants' § 1983 allegations. We thus reinstate and remand the § 1983 claims for further hearings.

CHIEF JUSTICE ROVIRA specially concurs as to Part IV, and JUSTICE LOHR joins in the special concurrence.

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[19] Claimants brought third-party actions under § 1983 against various individuals, including the Executive Director of the Department of Highways, the Chief Engineer, and highway maintenance supervisors and workers.

JUSTICE MULLARKEY specially concurs as to Part V and dissents as to Part II, and JUSTICE QUINN joins in the special concurrence as to Part V.

JUSTICE QUINN dissents as to Part IV, and JUSTICE MULLARKEY joins in the dissent.

State v. DeFoor, No. 90SA351

CHIEF JUSTICE ROVIRA specially concurs:

Except as to Part IV, in which I concur in the result only, I concur in the majority opinion. I write separately to emphasize my belief that the legislature is empowered to place recovery limitations on the statutorily created claim against public entity tortfeasors without violating the claimants' constitutional guarantee of due process.

After the Colorado Attorney General attempted to deposit the $400,000 maximum amount recoverable under section 24-10-114(1)(b), 10A C.R.S. (1988) with the registry of the district court, the claimants sought summary judgment alleging that section 24-10-114(1)(b), which limits the aggregate amount payable for any single occurrence involving two or more persons to $400,000,[1] is unconstitutional because it violates their constitutional guarantees of equal protection, due process, and access to courts. I limit my analysis to claimants' allegations that this statute violates their substantive due process rights.

I.

The majority found, *inter alia*, that the General Assembly can limit the state's liability for damages. *See* maj. op. at 7. I believe that this holding correctly acknowledges the constitutionality of section 24-10-114(1)(b) both facially and as applied to the claimants in this case.

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[1] This section also limits the per person recovery to $150,000.

A

In order to defeat a facial substantive due process challenge to a statute, the state need only show that a regulation is rationally related to a legitimate state purpose. *Bloomer v. Bd. of County Comm'rs of Boulder County*, 799 P.2d 942, 948 (Colo. 1990); *Colorado Soc'y of Community and Institutional Psychologists, Inc. v. Lamm*, 741 P.2d 707, 710-11 (Colo. 1987). As the majority and Justice Quinn's dissent point out, section 24-10-114(1)(b) bears a rational relationship to the legitimate government interests of fiscal solvency and fiscal integrity, and this provision is, thus, facially constitutional. *See* maj. op. at 17 and Quinn, J., dissenting at 1 & 2. Consequently, I turn to examine the effect of application of this statute on the claimants' due process rights.

B

While I recognize that a statute not objectionable on its face may nonetheless be found unconstitutional because of its effect in operation, *People v. Albrecht*, 145 Colo. 202, 208, 358 P.2d 4, 8 (1960), I do not believe that application of section 24-10-114(1)(b) results in deprivation of the claimants' due process rights. Nor do I find it conceivable that, having adjudged this statute facially valid, it is rendered invalid by its operation which effectuates the very purpose for which the statute was enacted — setting a ceiling on aggregate recovery from a single tortious occurrence.

In this case, there were thirty-four claimants seeking recovery for injuries caused by a single occurrence. The aggregate damages figure was more than the $400,000 recoverable under section 24-10-114(1)(b). Yet, unless there exists a deprivation of a property interest, there can be no denial of substantive due process. *See Faber v. State*, 143 Colo. 240, 241, 353 P.2d 609, 610 (1960) (due process operates to prohibit deprivation of rights where such rights exist under substantive law).

Under the Fourteenth Amendment to the United States Constitution and Article II, Section 25 of the Colorado Constitution, individuals are protected from loss of liberty without due process of law. Often, it is difficult to characterize an affected interest as a "liberty" or "property" interest. *See Morgan v. Mansfield*, 569 F. Supp. 710, 713 (D.Colo. 1983). The Supreme Court has held that the term "liberty" should be granted broad meaning and that it "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Board of Regents of State Colleges v. Resa*, 403 U.S. 564, 572 (1972) (citation omitted).

In *Espinoza v. O'Dell*, 633 P.2d 455, 462-64 (Colo.), *cert. granted*, 454 U.S. 1122 (1981), *cert. dismissed*, 456 U.S. 430 (1982), we recognized that children of an individual killed as a result of an allegedly willful and wanton tort perpetrated by the state had suffered deprivation of a liberty interest based on loss of continued relationship and association with the

deceased parent.[2] With these concepts in mind, I recognize that the individuals harmed or killed as a result of the accident that occurred on Berthoud Pass road have suffered a deprivation of their liberty interests. These claimants have regrettably been deprived of their freedom to remain free from bodily harm. *See Daniels v. Williams*, 474 U.S. 327, 341 (1986).

This liberty interest, however, is not the interest affected by section 24-10-114(1)(b). This provision in no way causes, condones, or affects acts which may result in deprivation of the interest in remaining free from bodily harm. Section 24-10-114(1)(b) instead affects the amount recoverable once such harm has occurred. It was the tortious act and not the statute placing a ceiling on aggregate recovery that caused these losses of liberty interest. Consequently, the effect of the statute is not on one's substantive guarantee of liberty but on one's property interest, if any, in a remedy arising from a

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[2] In *Espinoza*, we found that the Colorado wrongful death statute created an entitlement for damages in those indirectly injured by the tortfeasor's actions and that the statute also limited damages for such plaintiffs to net pecuniary loss. *Espinoza v. O'Dell*, 633 P.2d at 463. We determined that the statutory limitation on damages recoverable by these aggrieved plaintiffs did not sufficiently vindicate the claimed deprivation of liberty interest. *Id.* at 465. We analyzed the statutory damages limitation as applied to the deprivation of liberty interest suffered by these children by weighing the state's reasons for enacting the limitations against the liberty interest asserted. We determined that the children would remain uncompensated for the loss of important nonpecuniary aspects of the family relationship if the damages limitation were applied and declined to limit the plaintiffs' § 1983 damages claim to net pecuniary losses only. Unlike this case, however, the issue in *Espinoza* focused on the failure of the wrongful death statute to provide any compensation for deprivation of certain "aspects of the liberty interest" such as "losses flowing from a variety of associational interests, such as paternal love and care, instruction, counseling, emotional support, and the family's mutual enjoyment of life together." *Id.* at 464. It did not address the constitutionality of the damages limitation on recovery for deprivation of the aspects of the liberty interest for which the wrongful death statute provides compensation.

tortious act that may deprive an individual directly or indirectly of a liberty interest.

While recognizing that "[a] legal right to damage for an injury is property," *Rosane v. Senger*, 112 Colo. 363, 370, 149 P.2d 372, 375 (1944), the majority states that this provision is remedial and that there is no right to a remedy. Consequently, the majority finds that the claimants "failed to articulate a cognizable property interest in support of their due process claim." *See* maj. op. at 23. I believe, however, that a statutorily granted right to damages, validly limited, is property, but only to the extent to which it is statutorily defined. Property interests "are created and *their dimensions are defined by* existing rules or understandings that stem from an independent source such as *state law*." *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 538 (1985) (citation omitted) (emphasis added). The statutory scheme of the Colorado Governmental Immunity Act (Immunity Act), adopted in 1971, provides immunity from liability for public entities against all actions which lie in tort or could lie in tort except as provided for in the Immunity Act. § 24-10-105, 10A C.R.S. (1988). There is no constitutional right for persons to sue and recover a judgment against the state for the state's tortious conduct. Consequently, claimants' right to pursue an action against the state is derived solely from the statutory exceptions listed in the Immunity Act. Since the legislature is empowered to completely eliminate any recovery against public entities for claims asserted in tort, then the legislature certainly has the authority to limit recovery amounts where it has provided a remedy. *See Bloomer v. Bd. of County Comm'rs of Boulder County*, 799 P.2d 942, 948 (Colo. 1990) ("[T]he right to maintain an action against a governmental (state) entity is derived from statutes, and reasonable conditions . . . imposed as a condition precedent to the right are mandatory.") (citation omitted). This right to damages is, therefore, a property interest subject to constitutional protection only within its defined dimension of $400,000 maximum.

In *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989), the Supreme Court laid out a test for determining the existence of a federal right for the purpose of stating a claim under § 1983. In determining whether a statute creates an interest subject to the protection of § 1983, the Court considered "whether the provision in question creates obligations binding on the governmental unit," whether the asserted interest was sufficiently concrete so as to be enforceable by the judiciary, and whether the putative plaintiff is within the class of persons intended to be benefitted by the provision. Section 24-10-114(1)(b) does obligate the government to provide certain damages when it is found liable in tort. That obligation, however, is specifically limited to an amount no greater than $400,000. Thus, while the interest of the injured claimants here is sufficiently concrete and such injured claimants are within the class of persons which section 24-10-114(1)(b) is intended to protect, the legally protected interest created by this statute is the right to recover for damages only to the extent of a $400,000 aggregate maximum.

Since the $400,000 limitation was in effect at the time of this tortious occurrence, and since the state met this legislatively imposed obligation of $400,000, I do not find that the claimants were deprived of any protectable property interest triggering the due process clause.

I am authorized to state that JUSTICE LOHR joins in this special concurrence.

State v. Defoor, No. 90SA351

JUSTICE MULLARKEY specially concurring in part and dissenting in part:

I.

I specially concur in Part V of the majority opinion which remands for trial the claims asserted pursuant to 42 U.S.C. § 1983 (1988) ("1983 claims") against the individual state defendants. The 1983 claims allege that: (1) the individual defendants were "grossly negligent, reckless, and showed deliberate indifference to the public safety and human life" with respect to formulating and executing the Colorado Department of Highways ("Highways") policies on removing boulders from the Berthoud Pass road, and (2) the individual defendants' actions and inactions violated the complainants' due process protected rights to life, liberty, personal security and safe travel.

Taken in a light most favorable to the claimants, the facts show that Highways employee Phillip Pacheco deliberately pushed a 6.7 ton boulder off a switchback and over a steep incline directly above a well-traveled road. It rolled down the mountainside nearly 800 feet and struck the bus in which the claimants were riding. The custom and policy of clearing the road in such a dangerous manner had been followed by Highways for years. Prior experience, as well as a Highways-conducted study showing that neither trees nor cement and steel guardrails could be relied upon to halt a rolling boulder on a steep slope, made the defendants aware that the boulder was likely to roll onto the road below. Pacheco was the only employee working at the site at the time, and there were no flaggers or other devices to stop traffic on the road below. Thus, the evidence in the record supports the allegations of the 1983 claims that the individual employees' acts and omissions were grossly negligent, reckless or deliberately indifferent to public safety and human life.

I agree that the allegations adequately state 1983 claims. In *Espinoza v. O'Dell*, 633 P.2d 455, 464 (Colo. 1981), *cert. granted* 454 U.S. 1122 (1981), and *cert. dismissed* 456 U.S. 430 (1982), we upheld a 1983 claim asserting a protected liberty interest in the children of a man who was shot and killed by police officers and we concluded that there must be a remedy when "the government itself becomes the source of danger to an individual's rights." In *Uberoi v. University of Colorado*, 713 P.2d 894, 903 (Colo. 1986), we held that allegations of gross negligence, recklessness or intentional conduct are sufficient to raise 1983 claims under the due process clause. Read together, *Espinoza* and *Uberoi* support the 1983 claims now before us.

Moreover, other jurisdictions have upheld 1983 claims similar to those presented here. *See, e.g., Morrison v. Washington County*, 700 F.2d 678 (11th Cir. 1983), *cert. denied* 464 U.S. 864 (1983) (reinstating 1983 claim against a public hospital where the hospital had an "unruly" patient jailed and the patient died while in jail); *Ruge v. City of Belleview*, 892 F.2d 738 (8th Cir. 1989) (1983 claim held stated by estate of worker killed in a trench cave-in where defendant city had deliberate policy of not shoring its trenches). *See also* William, Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 Minn. L. Rev. 515, 518-19 (1989) (discussing the origins of deliberate indifference 1983 claims in *Rochin v. California*, 342 U.S. 165 (1952)).

Our decision reversing the trial court's dismissal of the 1983 claims necessarily rejects the qualified immunity defense asserted by the individual state defendants on appeal. The 1983 claims were clearly established under the test developed in *Anderson v. Creighton*, 483 U.S. 635, 639 (1987), and *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). I recognize that, on remand, the defendants again may claim qualified immunity contending that their conduct was objectively reasonable. *Guider v. Smith*, 431 N.W.2d 810, 816, n.15 (Mich.

1988) (trial court may consider immunity claims on motion to dismiss, motion for summary judgment and as defense to liability in trial on the merits). But, if so asserted, the qualified immunity claim must await a trial on the merits because conduct cannot be both deliberately indifferent as the claimants allege and objectively reasonable. *See* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Pa. L. Rev. 23, 57 (1989) (deliberate indifference precludes finding of objective reasonableness required to prove qualified immunity). Accordingly, these claims should proceed to trial.

II.

I agree with Justice Quinn that the $400,000 per occurrence cap contained in section 24-10-113(1)(b), 10A C.R.S. (1988), is unconstitutional but I write separately because my reasoning differs from his. In my view, there is no rational basis for the $400,000 cap and I would strike the cap as violating the equal protection guarantees of the state and federal constitutions. This issue was not before the court in *Lee v. Department of Health*, 718 P.2d 221 (Colo. 1986), and, for that reason, *Lee* is not dispositive. Accordingly, I join Justice Quinn's dissent from Part IV of the plurality opinion and I also dissent from Part II of the majority opinion.

It is clear that, for purposes of state liability, the governmental immunity act creates two categories of injured persons. The first category is those injured in accidents involving only one or two victims. The second category is persons injured in incidents involving more than two victims. Victims in the first category may collect $150,000 per person while recovery in the second category is limited to $400,000 in total. As the number of victims in a single incident increases, the amount recoverable per person decreases until, in a case like this, only a token recovery is possible for each individual.

The validity of these two categories must be tested under the rational basis standard. That test requires that "the statutory classification has a reasonable basis in fact and bears a reasonable relationship to a legitimate governmental interest. *Lee*, 718 P.2d at 227. In our jurisprudence, the rational basis test is not a "rubber stamp" signalling automatic approval of the challenged legislation but rather it requires a careful consideration of the reasonableness of the legislative classifications at issue. Recently, in *Gallegos v. Phipps*, 779 P.2d 856 (Colo. 1989), we applied the rational basis test and struck down a statute which attempted to reinstate the common law categories of trespasser, licensee and invitee for purposes of premises liability. We found that the duties imposed on landowners were not rationally related to the categories of injured persons created by the statute. *Id.* at 862 (the statutorily created hierarchy of duties "bears no rational relationship to a legitimate governmental interest and can be justified neither historically nor logically.") *See also Austin v. Litvak*, 682 P.2d 41 (Colo. 1984) (plurality opinion) (invalidating medical malpractice statute of repose under rational basis test).

Here the reasonableness of the two statutory categories must be evaluated in light of the stated goal of providing fiscal certainty to the state. *Lee*, 718 P.2d at 227-28. The legislature's different treatment of the two categories is arbitrary because no limitation at all is placed on the total claims paid or the number of claims paid in a given time period. The legislature may not have to do exact justice when drafting its statutes but the fit here is so rough and the adverse consequences are so great that the $400,000 limitation cannot stand. Consistent with the fiscal certainty goal, the $150,000 per person limit should be applied to the single incident, multiple victim case.

For these reasons, I dissent from Parts II and IV.

JUSTICE QUINN joins in Part I of this concurrence and dissent.

State of Colorado v. Defoor, No. 90SA351

JUSTICE QUINN dissenting in part:

I dissent from Part IV of the court's opinion, in which a plurality of the court upholds the trial court's entry of summary judgment against the claimants on their due process claim. I would hold that section 24-10-114(1)(b), 10A C.R.S. (1988), which places a $400,000 limitation on the cumulative recovery in tort for injuries and damages to two or more persons in any single occurrence, violates substantive due process of law under the Colorado Constitution when, as here, the limitation is applied in a manner that will bar any recovery by the claimants once the $400,000 limitation has been exhausted.

I do not dispute the General Assembly's right to limit an individual claimant's tort recovery to $150,000. Although such limitation may be less than full compensation in a given case, it nonetheless is adequate to cover most tort claims filed against a public entity and is reasonably related to the governmental objective of safeguarding the fiscal integrity of the public entity in carrying out its many functions. In those rare cases where $150,000 is not adequate compensation, such award still provides the claimant with moderate compensatory damages and, in that respect, is far better than a legislatively decreed governmental immunity for all claims against a public entity. I also concede that the $400,000 per-occurrence limitation is not so inadequate as to be facially unconstitutional as violative of due process of law. Most tort claims against the state involve one or two claimants. Even when more than two persons might be injured in a single occurrence, the $400,000 per-occurrence limitation can often be applied in a manner that will provide all claimants with a moderate amount of compensation for their injuries and damages and still accommodate the governmental interest in maintaining fiscal integrity.

In the present case, however, the application of the $400,000 per-occurrence limitation to the thirty-four claimants, nine of whom are pursuing wrongful death claims, so limits what I view as a claimant's legally protected property interest in receiving a moderate measure of compensation for injuries and damages caused by a public entity as to render that interest illusory in the extreme. I accordingly would not apply the $400,000 per-occurrence limitation as a bar to the claimants' tort actions, but, rather, would permit each claimant to file and seek recovery for money damages up to $150,000 as provided by the per-claim limitation of section 24-10-114(1)(a), 10A C.R.S. (1988).

I.

I accept the proposition that the Colorado Constitution does not prohibit the General Assembly from altering the nature of a common law tort claim, from eliminating a common law right to damages so long as an adequate substitute remedy is provided, or from imposing reasonable monetary limitations on a tort claim. *See generally Kandt v. Evans*, 645 P.2d 1300 (Colo. 1982); *O'Quinn v. Walt Disney Productions, Inc.*, 177 Colo. 190, 493 P.2d 344 (1972). In *Lee v. Department of Health*, 718 P.2d 221 (Colo. 1986), for example, we upheld the facial validity of the monetary limitations of the Colorado Governmental Immunity Act against an equal

protection challenge.[1] The fact that the monetary limitations do not facially violate a claimant's right to equal protection of the laws under the Colorado Constitution, however, is not to say that such limitations may therefore be applied to any and

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[1] In *Lee v. Department of Health*, 718 P.2d 221 (Colo. 1986), Lawrence Wayne Lee was injured in an automobile accident and brought suit against the Department of Health for the negligence of its employee in causing the accident. Lee's claim was in excess of the $150,000 limitation, and Lee's wife sued for loss of consortium in the amount of $150,000. The jury by special verdict found that Lee sustained total damages of $606,409.36 as a result of the combined negligence of the state employee and Lee, and attributed 51 percent of the negligence to the state employee and 49 percent to Lee. The jury made an identical apportionment of negligence on the wife's claim for loss of consortium and determined that her total damages amounted to $100,000. The trial court reduced Lee's award to $150,000 pursuant to the statutory per-claim limitation and also reduced the wife's award, based on the imputed negligence of Lee, to $51,000.

Lee raised a multitude of issues on appeal, including the claim that the monetary limitations of the Governmental Immunity Act violate equal protection of the laws by effectuating an arbitrary classification between public entities, which are subject only to limited liability under the statutory scheme, and private tortfeasors, who are responsible for all harms caused by their negligence. In rejecting Lee's equal protection challenge, we concluded that the statutory classification relating to claims against a public entity, although treating public entities differently from private tortfeasors, was based on real differences in fact between governmental and private tortfeasors. Public entities, we held, "are responsible for providing a vast array of governmental services to the public and, as a result, are exposed to far greater liability and risks than a private individual." 718 P.2d at 227. The legislative decision to limit the public entity's liability, we stated, "proceeds from actual differences in the magnitude and character of the functions assumed by public entities and in the effect of greater potential liability exposure on the public entity's ability to continue its governmental functions." *Id.* We went on to conclude that the statutory classification "is reasonably related to the governmental objective of providing fiscal certainty in carrying out the manifold responsibilities of government." *Id.* at 227-28.

(footnote continues)

all circumstances without implicating the due process rights of the victims of a governmental tort.

"[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). "'Equal protection' . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Ross v. Moffitt*, 417 U.S. 600, 609 (1973). Equal protection analysis, therefore, often involves an assessment of whether a statutory classification is unconstitutionally underinclusive by not including within the class all persons or groups who are similarly situated with respect to the purpose of the legislation or, alternatively, whether a statutory classification is unconstitutionally overinclusive by including within the class persons or groups who are not similarly situated with respect to the purpose of the statutory scheme. L. Tribe, *American Constitutional Law* 1446-50 (2d ed. 1988). Due process of law, in contrast, "emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated." *Ross*, 417 U.S. at 609. Substantive due process analysis, therefore, looks primarily to whether governmental power is arbitrarily directed against a person so as to deprive that person of a preexisting interest in life, liberty, or property. *See People v. Max*, 70 Colo. 100, 108-10, 198 P. 150, 154 (1921).

Furthermore, there is a significant difference between upholding the facial constitutionality of a statute and the

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(footnote continued)

Our decision in *Lee* resolved only the facial validity of the monetary limitations in the context of an equal protection challenge. We did not consider whether the $400,000 per-occurrence limitation would pass constitutional muster under due process analysis when applied in a manner that deprives a tort claimant of any meaningful redress for injuries and damages suffered as a result of the legal fault of a governmental entity in performing an activity for which the state had expressly waived the defense of sovereign immunity.

separate question of the constitutional validity of applying the same statute to a particular set of circumstances. To hold that a statute sufficiently satisfies threshold standards of constitutionality to survive a facial challenge is not to imply that the statute is thereby immune from challenge on grounds of unconstitutional application. *See, e.g., Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 337-38 (O'Connor, J., concurring); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503-04 (1982); *Lee v. Smith*, 772 P.2d 82, 85 (Colo. 1989); *New Safari Lounge v. Colorado Springs*, 193 Colo. 428, 434-35, 567 P.2d 372, 377 (1977). The application of the $400,000 per-occurrence limitation to the claimants in this case is a striking example of applying the facial terms of a statute in a manner that deprives the claimants of a substantial property interest in violation of due process of law.

II.

A legislative enactment creates a legally protected interest when it creates an obligation on the part of the state to others, when it delineates the interest of potential claimants in a specific and concrete manner so as to permit judicial enforcement of the interest, and when it manifests an intent to benefit the class of which the claimants are members. *See generally Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989). All three of these elements are present in the Colorado Governmental Immunity Act. First, section 24-10-106(1)(d), 10A C.R.S. (1988), specifically waives sovereign immunity for injuries resulting from a dangerous condition on a public highway. Second, inextricably intertwined with the specific right to recover against a public entity for injuries resulting from dangerous conditions on a public highway is the right of a tort claimant to recover an amount up to $150,000, as codified in section 24-10-114, 10A C.R.S. (1988). Third, the statutory right to recover an amount up to $150,000 is clearly intended to benefit persons such as the claimants in this case.

Construing sections 24-10-106(1)(d) and 24-10-114 as creating a legally protected property interest in recovering money damages from a public entity for injuries and damages tortiously inflicted by the public entity is in accord with basic concepts of fairness. Years ago this court held in *Rosane v. Senger*, 112 Colo. 363, 370, 149 P.2d 372, 375 (1944), that a legal right to recover damages for a tortiously inflicted injury is a property interest protected by due process of law. Our holding in *Rosane* is by no means unique in that respect. *See, e.g., National Ass'n of Radiation Survivors v. Derwinski*, No. C-83-1851-MHP, 1991 WL 248656 (N.D. Cal. Nov. 21, 1991) (on remand from Supreme Court's decision rejecting facial due process challenge to $10 statutory limit on attorney fees for assisting with disability claims before Veterans Administration, federal district court holds statute violative of due process as applied to claimants' constitutionally protected property interest in presenting complex claims for disability based on ionizing radiation); *Condemarin v. University Hospital*, 775 P.2d 348, 356-60 (Utah 1989) (Durham, J.) (holding that the balancing of statutory limitation on tort award against governmental entity and the purpose served by statutory limitation should be analyzed under due process, rather than equal protection, in order to take proper account of serious abrogation of important substantive right to recover for personal injuries caused by governmental entity). Moreover, no one today can seriously question the proposition that a person has an interest in freedom from bodily harm tortiously inflicted by a governmental entity and that such interest qualifies as a liberty interest for due process purposes. *See Daniels v. Williams*, 474 U.S. 327, 341 (1986) (Stevens, J., concurring). Finally, we have previously recognized that the heirs of a victim killed as a result of a governmental tort may rightfully claim "a personal constitutional liberty interest" in the continued life of their deceased spouse, parent, or child. *Espinoza v. O'Dell*, 633 P.2d 455, 463 (Colo. 1981), *cert. granted*, 454 U.S. 1122 (1981), *cert. dismissed*, 456 U.S. 430 (1982). If a person has a liberty interest in personal security

against governmentally inflicted bodily injury and also a "personal constitutional liberty interest" in the continued life of a spouse, parent, or child, it follows axiomatically that the same person should be accorded the right to seek some measure of moderate compensation to redress the unlawful governmental deprivations of those interests. Otherwise, the interests themselves become nothing more than legal fictions.

To be sure, the nature and extent of the property interest in recovering moderate compensation for injuries and damages caused by tortious governmental conduct finds its source in state law, specifically the Colorado Governmental Immunity Act, §§ 24-10-101 to -120, 10A C.R.S. (1988 & 1991 Supp.). The mere fact that a property interest originates in state law, however, does not mean that a statutory scheme that creates the property interest is beyond the pale of an unconstitutional application in violation of due process of law. The plurality accepts the fact that the statutory scheme waives sovereign immunity in tort for injuries resulting from a dangerous condition on a highway and grants the tort victim the statutory right to sue and recover from the public entity responsible for the dangerous condition a judgment not in excess of $150,000, §§ 24-10-100(1)(d) & 24-10-114(1)(a), 10A C.R.S. (1988), but then, enigmatically in my view, permits the $400,000 per-occurrence limitation to annul that same statutory right whenever the total damages awarded to other victims of the same disaster have exceeded the statutory limitation. In reaching that result, the plurality reasons that "[s]ection 24-10-114 is a limited remedial statute" which "supplies a carefully defined range of remedies for causes of action created under other sections of the Act" and thus does not create a "cognizable interest in support of [the claimants'] due process claim." Plurality op. at 22-23. The $400,000 per-occurrence limitation of section 24-10-114(1), however, can hardly be considered "remedial" when its application to the multi-victim disaster in this case results in depriving most of the injured claimants, as well as most of the heirs or representatives of those killed in the accident, of any legal redress

whatever for their respective injuries and damages. I view the plurality's rejection of the claimants' due process claim as countenancing the very type of incongruous creation and annulment of a significant property interest that the doctrine of unconstitutional application was designed to prohibit.

The state may not grant the victim of a governmental tort a property interest in recovering a judgment against a public entity and then, in the same statutory scheme, so condition the right on circumstances beyond the control of the victim as to result in the abolition of the very interest created by the statute. In holding otherwise, the plurality employs a "bitter-sweet" analysis which requires a tort claimant to take the "bitter" per-occurrence limitation with the "sweet" statutory right to sue the governmental tortfeasor. That analysis, however, leads to the anomalous result of elevating the $400,000 limitation to the status of a fundamental defining element of the very interest created by the statute. A property interest, however, "cannot be defined by the procedures provided for its deprivation any more than can life or liberty." *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 541 (1985). On August 10, 1987, therefore, when Department of Highways employees moved a 6.7-ton boulder off the side of a public highway and caused it to roll down Berthoud Pass and strike a bus and kill nine occupants and injure twenty-five occupants, each injured victim and the heirs or representatives of each deceased victim had a legislatively created and legally protected property interest in suing the state and in receiving a compensatory damages award, not to exceed $150,000, upon proving that the Department of Highways was legally at fault in causing the dangerous road condition.

III.

It should be kept in mind that this case comes to us on summary judgment and that, consequently, the trial court's judgment can be affirmed only if this court is convinced that the application of the $400,000 per-occurrence limitation

would not violate due process of law under any set of factual circumstances disclosed by the record. *E.g., Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1339-40 (Colo. 1988); *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712-13 (Colo. 1987); *Mount Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 238-41 (Colo. 1984). I am unable to conclude that the application of the statutory limitation is consonant with due process of law under the state of the record in this case.

The record shows that the costs incurred by only a few of the nine persons killed and the twenty-five persons injured in this disaster will exhaust the statutory per-occurrence limitation. A hospital that treated one of the victims killed in the accident has filed a lien for $327,907.60 for medical costs. In addition, one of the injured victims has tendered a notice of claim to the Attorney General alleging damages in the amount of $150,000, and another injured victim has filed a notice of claim in the amount of $500,000. The record also contains an affidavit from an experienced arbiter who reviewed the documents relating to the damages incurred by the claimants. The arbiter's affidavit states that the probable aggregate of damage to all claimants and their families greatly exceeds $400,000 and that the damage to several individual claimants clearly exceeds $150,000. Obviously, therefore, if one wrongful death claimant receives $150,000, and the two other injured claimants collect $150,000 and $100,000 respectively on their claims, the remaining thirty-one victims will be left without any recourse whatever to obtain compensation for their injuries. Even if the $400,000 were to be divided equally among all claimants, the resulting award of approximately $11,000 to each claimant would amount to nothing more than an illusory remedy at best when the $11,000 is weighed against the staggering medical costs, injuries, lost wages, permanent disability, loss of earning capacity, pain and suffering, and loss of enjoyment of life incurred by the claimants.

Finally, so far as the record before us shows, permitting each claimant to sue the Department of Highways and recover a judgment for $150,000 would not endanger the fiscal integrity of the state. By statute, the Division of Risk Management is charged with the administration of the fund out of which claims against a state public entity are paid. §§ 24-30-1501 to -1520, 10A C.R.S. (1986 & 1991 Supp.). The Risk Management Division, in the discovery phase of the case, produced several annual reports which it prepared for the General Assembly. The 1989 report, which is the latest in the record, shows that since the year 1985 the Division received state appropriations of approximately $7,000,000 and earned $549,922 in interest on those appropriations. 1989 Annual Report of Division of Risk Management at 2. During this same period the Division paid out only $927,437 in claims and set aside $1,707,861 in reserve for open claims. *Id.* at 4. The record also shows that a task force appointed by the Governor to study the liability limits of the Colorado Governmental Immunity Act found that approximately 1500 claims per year were filed against the state since 1985, that the average payment on these claims was $1,000, and that the largest payment was only $50,000. Governmental Immunity Limits Task Force Report to Governor and General Assembly at 3 (1988).[2]

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[2] The task force recommended that section 24-10-114, 10A C.R.S. (1988), be amended by the addition of the following subsection:

> (5) Notwithstanding the limits established in this section, a judgment or judgments may be claimed and rendered against the state in excess of these amounts, provided that the portion of the judgment or judgments which exceeds the limits shall not be paid until and unless the General Assembly authorizes payment of the whole portion or any part thereof which exceeds the limits. Any claimant may present proof of judgment to the General Assembly and request payment of that portion of the judgment which exceeds the limits. Any portion in excess of the limits shall be paid from the general fund or any other funds established by the General Assembly.

(footnote continues)

Under the circumstances of this case, the application of the $400,000 per-occurrence limitation to the thirty-four claimants consigns them to running a "race to judgment" in order to vindicate their rights. The speed at which a judgment may be obtained in that race is, for all practical purposes, a matter of chance. Yet, to all who lose the race, the "law has become a phantom and justice a dream, and constitutional guarantees of the sacredness of life, liberty, and property, 'a tale . . . full of sound and fury, [s]ignifying nothing.'" *Max*, 70 Colo. at 112, 198 P. at 155.

I accordingly dissent from the plurality's rejection of the claimants' due process claim.

JUSTICE MULLARKEY joins in this dissent.

(footnote continued)

Governmental Immunity Limits Task Force Report to Governor and General Assembly at 2 (1988).

No. 90SA351

Supreme Court, State of Colorado

DEFENDANTS-APPELLANTS' PETITION FOR HEARING

THE STATE OF COLORADO, by and through the Colorado State Claims Board of the Division of Risk Management,

Plaintiff-Appellee,

v.

YVONNE E. DEFOOR, FRANK BOWEN; MARGIE BOWEN; ELINOR M. BUTENHOFF; URS FREI; MICHAEL HATTON; THE ESTATE OF ANNA HAYES, Deceased; THE CHILDREN AND ESTATE OF ARLENE JOHNSON, Deceased; ESTATE OF JOHN KILLEEN, Deceased; ESTATE OF MARKUS LANG, HERBERT LAND, as survivor, heir and personal representative of Markus Lang and THE ESTATE OF MARKUS LANG, RITA LAND as survivor, heir and personal representative of Markus Lang and THE ESTATE OF MARKUS LANG, and ELFRIEDE BORRILLO, as Special Administrator of the Estate of Markus Lang; THE ESTATE OF DOUGLAS MACKENZIE, Deceased; SUZANNE MACKENZIE; MICHAEL MCGARVEY, NANCY MCGARVEY, BERNADINE M. REMMERS; CAROL J. SMITH, THOMAS C. SMITH, AND MEAGAN N. SMITH, a minor; THE ESTATE OF GLADYS STEWART, Decreased; THE ESTATE OF SOL STEWART, Deceased; THE CHILDREN AND ESTATE OF KEITH WALTERS, Decreased; THE CHILDREN AND ESTATE OF KATHLEEN WALTERS, Deceased; HOROSHI YOSHIOKA; MORDEKHAY FUMISHIKA; MASHASIKI MAKAYAMA; MIKAYO TAJIMA; and CLARENDON NATIONAL INSURANCE COMPANY; SAN JUAN TOURS, INC. d/b/a GRAY LINE TOURS; and all persons or entities suffering, or claiming to suffer, damages resultant

[*continued*]

from the August 10, 1987 collision between a boulder and a Gray Line Tour Bus on U.S. Highway 40, about seven miles east of Winter Park, Colorado, while the bus was on Berthoud Pass,

Defendants-Appellants,

v.

THE COLORADO DEPARTMENT OF HIGHWAYS and THE COLORADO DIVISION OF HIGHWAYS, PHILLIP PACHECO, EARMAN PACHECO, MERLE ZIMMER, PHILLIP WEST, ROSS HAMILTON, EDWARD FINK, JOHN M. SALAZAR, R.L. CLEVENGER, DWIGHT BOWER, PHIL MCCULLOUGH, AND LOWELL JACKSON,

Third-Party Defendants and counter Defendants-Appellees.

Appeal from the District Court, City and County of Denver, Honorable Sandra I. Rothenberg, Judge

EN BANC

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CASE REMANDED WITH DIRECTIONS

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EN BANC DECISION

JUSTICE VOLLACK delivered the Opinion of the Court as to Parts I, II, III, and V, and announced the Judgment of the Court as to Part IV.

CHIEF JUSTICE ROVIRA specially concurred as to Part IV, and JUSTICE LOHR joined in the special concurrence.

JUSTICE MULLARKEY specially concurred as to Part V and dissented as to Part II, and JUSTICE QUINN joined in the special concurrence as to Part V.

JUSTICE QUINN dissented as to Part IV, and JUSTICE MULLARKEY joined in the dissent.

Pursuant to Rule 40 of the Colorado Appellates Rules Defendants-Appellants submit this Petition for Rehearing as follows:

1. The social implications of this Court's decision in the Berthoud Pass Bus-Rock case are unsettling. This Court has in essence ruled that the interests of the State are paramount to the interests of the individual. The Court's analysis of the constitutional issues raised in this appeal reflects partiality to concerns of governmental operations and desensitization to the needs of the persons for whom that government was ordained to serve. Throughout the Court's analysis, the abiding concern is the fiscal integrity of the government. Against this concern, little or nothing is said of the enormous personal tragedy and burden which the State seeks to shift to the victims of its own wrongdoing. In essence, the State has ordained that certain persons, particularly those involved in multi-victim tort incidents, shall be required to sacrifice their rights and claims to fair compensation for the benefit of the government and its operations. The government cannot be of the people, by the people and for the people when it denies them effective remedies for wrongs it has committed against the people. When government serves the people in this way, it has ceased to serve, and has become an organism whose chief purpose is to sustain its own life.

2. The Court erroneously applied the rational basis test in its equal protection analysis of C.R.S. 24-10-114. One's life and personal bodily security are not mere economic issues, nor does this statute present a simple case of classic economic regulation. Equal protection analysis of statutes limiting compensation for the loss of life and health mandates application of heightened or intermediate scrutiny. Even if the rational basis test is applied, the factual record in this case is devoid of evidence that the

harsh damage limitation scheme of the Colorado Governmental Immunity Act (CGIA) is necessary to assure sound fiscal planning or the continued provision of essential public services. No actuarial or statistical data supported the legislature's action in passage of the damage limitation provisions of the CGIA. Though the state's fiscal integrity may be a legitimate state interest, the damage limitation provisions of the CGIA do not "rationally" relate to that interest.

3. The majority opinion is premised upon a conclusory assumption without basis in fact. The assumption is that the governmental immunity damage caps are necessary to assure the continuing solvency and function of the State government. The factual record demonstrates beyond a reasonable doubt that the state's fiscal integrity is not at risk because of tort actions which may be brought against it. The majority opinion quotes at length from the 1968 Legislative Council report on Governmental Liability in Colorado, Research Publication No. 134 (Nov. 1968). This report notably and expressly recommended aggregate caps of $3,000,000, not the paltry sum of $300,000 which was eventually adopted by the General Assembly without debate or discussion recorded in the legislative history. The Majority decision mentions minimizing taxpayer burdens. As the damage caps are applied in this case, a medical bill of $327,907.60 incurred by Markus Lang at Denver General Hospital cannot be paid by Markus Lang (who has died). This bill will now inevitably be borne by the taxpayers of the City and County of Denver instead of the taxpayers of the State of Colorado. Ironically, the statute results in the shift of the burden of this bill from the larger public entity which caused the injury to a smaller public entity which had committed no wrongdoing at all. Further, once Markus Lang was removed by air ambulance to Germany, he remained hospitalized in Germany from March through July 1988, and the People of the Federal

Republic of West Germany were thereafter required to undertake his care and assume the financial burden of his care. Through the application of this statute, the wrongdoing public entity has succeeded in shifting massive obligations to other public entities across the globe whose citizens were lured to Colorado by Colorado's billion dollar marketing and tourist industry. Through operation of this statute and others minimizing compensation for injury in this State, Colorado is now one of the least safe places to travel in the United States.

The majority opinion refers to this as an "extreme" case. On the other hand, consider the number of school children who daily ride buses to their schools or to outings in the mountains. This tragedy could be repeated with the victims all being our children or grandchildren. The State surely has an interest in assuring the future security, health, and rehabilitation of its citizens' children. The statute bears no rational relationship to that objective.

4. The Court erred in interpreting Article II, Section 6 of the Colorado Constitution (access to courts). The Court erroneously states that this provision *only* provides a right of access to the Courts, but does not control the scope or substance of any remedy. This is contrary to the constitutional provision which guarantees not only the right to file a cause of action, but also promises a "speedy remedy afforded for every injury to person". As applied in the present case, the damage limitation provisions of the CGIA effectively deny any meaningful remedy to the victims of the Berthoud Pass bus accident.

Contrary to the Majority's interpretation of Claimants' position, claimants contend that the Common Law of this State provided not only a remedy, but an *adequate* remedy to citizens injured at the hands of the government. *Evans v. Board of County Commissioners*, 174

Colo. 97, 482 P.2d 968 (1971) made clear that sovereign immunity was not part of the common law of this State. Correlatively, the right to adequate redress for damages inflicted by the government must be part of the state's common law. This Court's interpretation of the access to courts constitutional provision renders that constitutional guarantee meaningless. Under a plain reading of this Court's interpretation, as long as citizens can enter the courthouse door, their rights are satisfied, even if that Court is powerless to offer them any remedy at all. This Court's interpretation of the access to courts provision renders Colorado court's hollow halls of legal bureaucracies, without any guarantee to deliver justice in the form of a legal remedy for a wrong. A right without a remedy is not right at all.

5. Claimants do not argue that the state's monetary liability for its torts must be unlimited, as asserted in this court's opinion. Rather, claimants argue that this statute (and this Court in interpreting this statute) must constitutionally balance the interest of the state's fisc against the interest of the victims of the state's wrongful conduct. This Court erred in failing to address this constitutionally mandated balancing test anywhere in its analysis of the constitutionality of the statute. The dissenting opinions suggest a more sensitive balance can be achieved between the interests of the state and those of the victims by eliminating the aggregate caps as applied in this case. Minimally, that would provide greater relief to the individual victims and achieve the purpose of protecting the state from "unlimited" liability. The due process balancing test described in Claimant's Reply Brief forwards the interests of both the claimants and the government. In this case, the majority opinion fails to acknowledge the tragic effect the damage limitation provisions has on the individual victims of the Berthoud Pass accident. The "harsh" impact of sovereign immunity has been given new life in this decision.

6. The Court erred in failing to consider the constitutionality of the statutory damage caps as applied in this case. The issues of this appeal were decided on summary judgment, and the implication of the Court's opinion is that there is no set of facts which could demonstrate this statute is unconstitutional as applied. It is hard to imagine injustice on a grander scale than the application of the CGIA's damage limitation provisions to the facts of this case. If the light of innocent life can be snuffed so quickly and compensation for the loss of life can be eschewed so openly and so callously, then there may be no set of facts wherein this statute may be found unconstitutional. The government has at once granted victims of governmental wrongdoing a property interest in recovering judgments for loss of life and health, and at the same time so qualified that right as to lead to its abolition. *See* Quinn, J. dissent, p. 9. If three claimants receive $150,000, $150,000 and $100,000 respectively, the remaining thirty-one victims receive nothing. The statutory scheme does not provide for any apportionment or fair division of the proceeds. The victims of the multi-victim disaster are unjustly left to fight among themselves for the small biscuit of compensation provided by the state. The tragedy of this incident is revisited on the victims through the crushing application of a statute enacted on the basis of unfounded and factually unsupported assumptions.

7. The Court erroneously limited *Rosane v. Senger*, 112 Colo. 363, 149 P.2d 372 (1944) in its due process analysis. Claimants rely on *Rosane* for the proposition that they have a legal right to damage for an injury which property right cannot be deprived without due process. The Court erroneously analyzed claimants due process rights as only rights to causes of action rather than rights to damages for injury. Claimants' due process rights include not only the right to pursue causes of action, but the right to pursue "meaningful" causes of action which

provide "meaningful" remedies for the loss of life and serious impairment of health.

Lives of innocents have been lost; other innocents' lives have been changed forever. They may knock at the door of the Courthouse; they may even enter; but they leave with even less than they entered.

WHEREFORE, on the grounds set forth above, Defendants-Appellants respectfully request this Honorable Court to grant a rehearing on the case and for such other and further relief as the Court deems just and necessary.

Dated this 14th day of February, 1992.

Respectfully submitted,

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No. 90SA351

Supreme Court, State of Colorado

APPEAL FROM THE DISCOURT COURT, DENVER, COUNTY, 88CV141

THE STATE OF COLORADO, by and through the Colorado State Claims Board of the Division of Risk Management,

Plaintiff-Appellee,

v.

YVONNE E. DEFOOR, FRANK BOWEN; MARGIE BOWEN; ELINOR M. BUTENHOFF; URS FREI; MICHAEL HATTON; THE ESTATE OF ANNA HAYES, Deceased; THE CHILDREN AND ESTATE OF ARLENE JOHNSON, Deceased; ESTATE OF JOHN KILLEEN, Deceased; ESTATE OF MARKUS LANG, HERBERT LANG, as survivor, heir and personal representative of Markus Lang and THE ESTATE OF MARKUS LANG, RITA LANG as survivor, heir and personal representative of Markus Lang and THE ESTATE OF MARKUS LANG, and ELFRIEDE BORRILLO, as Special Administrator of the Estate of Markus Lang; THE ESTATE OF DOUGLAS MACKENZIE, Deceased; SUZANNE MACKENZIE; MICHAEL MCGARVEY, NANCY MCGARVEY; BERNADINE M. REMMERS; CAROL J. SMITH, THOMAS C. SMITH AND MEAGAN N. SMITH, a minor; THE ESTATE OF GLADYS STEWART, Deceased; THE ESTATE OF SOL STEWART, Deceased; THE CHILDREN AND ESTATE OF KEITH WALTERS, Deceased; THE CHILDREN AND ESTATE OF KATHLEEN WALTERS, Deceased; HOROSHI YOSHIOKA; MORDEKHAY FUMISHIKA; MASHASIKI NAKAYMA; MIKAYO TAJIMA; and RODNEY ALVA WEST;and CLARENDON NATIONAL INSURANCE COMPANY; SAN JUAN TOURS, INC. d/b/a GRAY LINE TOURS; and all persons or entities suffering, or claiming to suffer,

[*continued*]

damages resultant from the August 10, 1987 collision between a boulder and a Gray Line Tour Bus on U.S. Highway 40, about seven miles east of Winter Park, Colorado, while the bus was on Berthoud Pass,

Defendants-Appellants,

v.

THE COLORADO DEPARTMENT OF HIGHWAYS and THE COLORADO DIVISION OF HIGHWAYS, PHILLIP PACHECO, EARMAN PACHECO, MERLE ZIMMER, PHILLIP WEST, ROSS HAMILTON, EDWARD FINK, JOHN M. SALAZAR, R.L. CLEVENGER, DWIGHT BOWER, PHIL MCCULLOUGH, AND LOWELL JACKSON,

Third-Party Defendants and Counter Defendants-Appellees.

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 24, 1992.

Justice Quinn and Justice Mullarkey would grant the petition.

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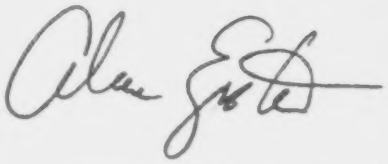

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No. 91-1877

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE COLORADO DEPARTMENT OF HIGHWAYS and
THE COLORADO DIVISION OF HIGHWAYS,
PHILLIP PACHECO, *et al.*,
Petitioners,

v.

YVONNE DEFOOR, FRANK BOWEN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Colorado

---

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to consider this petition for writ of certiorari under 28 U.S.C. § 1257 when no federal issue was finally decided?

2. Assuming jurisdiction, was the Colorado Supreme Court correct in any event in reinstating respondents' § 1983 claims given the specific, nonconclusory allegations of the petitioners' deliberate disregard of the respondents' constitutional rights?

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IN THE

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No. 91-1877

THE COLORADO DEPARTMENT OF HIGHWAYS and
THE COLORADO DIVISION OF HIGHWAYS,
PHILLIP PACHECO, *et al.*,
Petitioners,

v.

YVONNE DEFOOR, FRANK BOWEN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Colorado

---

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The decision of the Colorado Supreme Court is reported as *State v. DeFoor*, 824 P.2d 783 (1992).

JURISDICTION

This Court lacks jurisdiction to entertain this petition for certiorari because the decision of the Colorado Supreme Court was not a final judgment of a federal issue within the meaning of 28 U.S.C. § 1257. *See* Reasons For Denying The Writ, *infra*.

RELATED CASE

On May 26, 1992, respondents, in No. 91-1922, petitioned for writ of certiorari relative to the Colorado Supreme Court's decision in *State v. DeFoor* to uphold the $400,000 limitation of damages per occurrence against the families of the nine travellers killed and the 19 travellers injured by the actions of the petitioners here.

STATEMENT OF THE CASE

The catastrophic event generating this case occurred on a mountain switchback highway on Berthoud Pass, Colorado, on August 10, 1987. An employee of the Colorado Department of Highways, using a front-end loader in the performance of his duties and within the scope of his employment, pushed a seven-ton boulder over a precipice. The rock tumbled 750 feet down a mountainside onto United States Highway 40 on the west side of the Pass and ripped into and crushed a tour bus. The consequences were fatal: nine tourists were killed. Nineteen others were severely injured. The petitioners' description of this catastrophe as an ordinary roadway accident is shamefully disingenuous.

Rock removal operations on nearby Loveland Pass in the weeks previous to the catastrophe also resulted in rocks tumbling onto the highway. Yet, no steps were taken either to modify the rock removal operations or to stop traffic or otherwise to warn travellers crossing the Continental Divide. The Colorado Department of Highways and its employees continued to displace rocks despite the knowledge that rocks so moved would overrun the public highway below.

Respondents have alleged that the state employees acted under the color of the customs and policies of the Colorado Department of Highways with regard to rock removal operations, which customs also included unreasonable work-production schedules. It is alleged that the conduct of the state employees under color of state cus-

tom and policy was wilful, wanton, grossly negligent, reckless and in deliberate disregard of human life and health.

On January 7, 1988, the State of Colorado filed an interpleader action in Denver District Court, naming as defendants the respondents herein and seeking to deposit a total sum of $400,000 into the registry of the court as the full extent of the State's obligation for the catastrophic deaths and injuries suffered by the 28 tourists resulting from the State's rock-clearing operations. Respondents counterclaimed against the State, contending, among other things, that the $400,000 aggregate—*i.e.*, the per occurrence maximum damages amount provided by § 24-10-114(1)(b), 10A C.R.S. (1988)—violated their constitutional rights to equal protection of the laws and to substantive due process of law. The Colorado Supreme Court ultimately concluded that the families of the nine decedents and the 19 injured survivors are entitled to recover no more than a total of $400,000 in damages under the state's governmental immunity act, an amount which will not even cover the medical bills of one of the victims on Berthoud Pass. *See* Related Case, No. 91-1922.

Respondents also filed third-party civil rights claims against the individual state employees under 42 U.S.C. § 1983. The petitioners herein moved for summary judgment, asserting that the factual allegations in the complaint did not state a claim for relief under § 1983 and that the individual state employees were entitled to qualified immunity from suit. In a three-sentence ruling, the trial court granted the motion, dismissing the respondents' § 1983 claims. However, the trial court made *no* findings of fact specific to those claims. No factual discovery whatsoever transpired. Moreover, the trial court did not articulate the reasons for the dismissal of the respondents' claims, but merely concluded that the respondents did not state a claim under § 1983.

On appeal, the Colorado Supreme Court concluded that the trial court prematurely dismissed the § 1983 claims, remanding the claims for further hearings. The Colorado Supreme Court apparently intended to give the victims a reasonable opportunity to be heard on their § 1983 claims.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DECLINE JURISDICTION BECAUSE THE COLORADO SUPREME COURT'S DECISION WAS NOT FINAL AS TO THE FEDERAL ISSUE BUT INSTEAD SIMPLY REMANDED THE CASE FOR FURTHER HEARINGS IN ORDER PROPERLY TO POSTURE THE FEDERAL ISSUE.

Under 28 U.S.C. § 1257, this "Court's jurisdiction to review a state-court decision is generally limited to a final judgment rendered by the highest court of the State in which decision may be had." *Flynt v. Ohio*, 451 U.S. 619, 620 (1981). No matter how petitioners attempt to frame a federal issue for review by this Court, the Colorado Supreme Court did not finally determine any federal issue. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975).

The problem turns on correctly identifying the federal issue. To make that identification, the Colorado Supreme Court's three-paragraph disposition of the § 1983 claims in *State v. DeFoor* must be properly examined. In the first paragraph, the Court stated:

> Finally, claimants contend that the district court erred in dismissing their § 1983 claims against individual defendants for failure to state claims sufficient to expose the individual defendants to civil rights liability.[1] We agree.

---

[1] "Claimants brought third-party actions under § 1983 against various individuals, including the Executive Director of the Department of Highways, the Chief Engineer, and highway maintenance supervisors and workers." [Note by the Colorado Supreme Court.]

824 P.2d at 793. In this first paragraph, the Colorado Supreme Court agreed with the respondents' contention that the trial court committed error. The trial court, it must be emphasized, made no specific findings of fact or rulings of law concerning § 1983 issues.

In the second paragraph, the Colorado Supreme Court stated:

> In order to state a claim for relief under § 1983, a plaintiff must allege that a defendant acted under color of state law and that the defendant's action deprived the plaintiff of a right secured by the federal constitution or federal laws. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). Courts must then determine whether such rights have been violated by applying substantive federal-law that defines the requisite state of mind and the other requirements for pleading a civil rights action. *Daniels v. Williams*, 474 U.S. 327, 330 (1985); *Baker v. McCollan*, 443 U.S. 137, 140 (1979); Sheldon Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 3.02, 141 (3d ed. 1991). Finally, the defendant can assert qualified immunity defenses to defeat a § 1983 claim. *Hafer v. Melo*, —— U.S. ——, 112 S.Ct. 358 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989); *Anderson v. Creighton*, 483 U.S. 635 (1987).

This second paragraph essentially instructs trial courts what factors to look for when considering § 1983 claims and defenses to them. The Colorado Supreme Court reiterated the fundamentals of a claim for relief under § 1983, correctly highlighting the current substantive federal law defining the requisite states of mind of the defendants. The Colorado Supreme Court concluded the second paragraph by reminding the trial courts of the general availability to defendants of the defense of qualified immunity to defeat a § 1983 claim.

The third and final paragraph of the Colorado Supreme Court's opinion is as follows:

> Noting that the parties "against whom summary judgment is sought [are] entitled to the benefit of all favorable inferences that may be drawn from the facts," *Churchey v. Adolph Coors Company*, 759 P.2d 1336, 1339-40 (Colo. 1988) (citations omitted), we are not convinced that there was no genuine issue of material fact with respect to claimants' § 1983 allegations. We thus reinstate and remand the § 1983 claims for further hearings.

In *Churchey*, the Colorado Supreme Court emulated federal practice in considering the propriety of summary judgments, citing 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2716 (2d ed. 1983) ("'reviewing court . . . cannot decide disputed issues of material fact'"); and Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984). 759 P.2d at 1340.

Taken together, the three paragraphs can only be construed to mean that the Colorado Supreme Court concluded that the trial court's dismissal of the § 1983 claims was premature. The result was that the federal issues were not properly postured for review.

Because the Colorado Supreme Court was not convinced that no genuine issue of fact lurked in the matter on review, further hearings, though not necessarily a trial, were ordered. Hence, upon remand the trial court must hold further hearings on several crucial matters, including whether any discovery is necessary to crystalize the issue of immunity given that the character of the individual defendants' acts as discretionary or ministerial is disputed, whether any facts relevant to the issue of the character of the state's customs and policies are in the exclusive control of the defendants, and whether amendments to the complaint are necessary to cure any defect arising from changes in substantive federal law since the events on Berthoud Pass. The respondents do have the right, with leave of the court (which, of course, must be freely given), to amend the pleadings. Absent

these further proceedings by the trial court, the matter is not ripe for this Court's review.

For example, the trial court may again entertain a motion to dismiss the claims based on qualified immunity. However, a genuine dispute exists as to whether the acts by the state employees on Berthoud Pass were discretionary or ministerial such as to raise the issue of whether qualified immunity is available at all. *Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir. 1991) (because it was "disputed whether the functions which [the] defendant . . . failed to perform [were] discretionary or ministerial," defendant's motion for summary judgment "on the basis of qualified immunity" should not have been granted).

The trial court may also determine on remand whether the existing allegations, which includes the allegation that the state employees "*knew, or should have known or expected, that there were travellers on U.S. Highway 40, below, and that the travellers were within the range of the dangerous acts and omissions of causing the boulders to descend the embankment*," are "specific, nonconclusory factual allegations" establishing, among other things, the requisite state of mind according to substantive federal law. *See Seigert v. Gilley*, 500 U.S. ——, 111 S.Ct. 1789, 114 L.Ed.2d 277, 289 (1991) (Kennedy, J., concurring); *Elliot v. Thomas*, 937 F.2d 338, 344 (7th Cir. 1991) ("When intent is one of the substantive elements of a constitutional wrong, the plaintiff is entiled to an adequate opportunity to establish that the defendant acted with the proscribed intent."), *cert. denied*, —— U.S. ——, 112 S.Ct. 973, 117 L.Ed.2d 138 (1992); *Sawyer v. County of Creek*, 908 F.2d 663, 665-66 (10th Cir. 1990) ("Following a defendant's motion to dismiss, the district judge should permit the plaintiff to come forward with any additional allegations showing that the defendant violated clearly established law."). The trial court may then decide, among other things, whether the customs,

policies, and conduct of the petitioners were deliberately indifferent, arbitrary, and shocking to the conscience, as well as whether any amendment to the complaint may be necessary. Thus, the Colorado Supreme Court properly remanded the respondents' civil rights claims for further hearings. The results will be open to further review by the Colorado Supreme Court and, if necessary, by this Court. For these reasons alone, this petition for writ of certiorari should be denied.

II. ASSUMING THIS COURT HAS JURISDICTION, THE COLORADO SUPREME COURT'S OPINION IS CONSONANT WITH THIS COURT'S PRECEDENTS CONSTRUING § 1983, INCLUDING *COLLINS v. CITY OF HARKER HEIGHTS, TEXAS.*

Contrary to the petitioners' assertion, the Colorado Supreme Court's opinion does not and will not elevate an ordinary tort claim into a case of constitutional dimension. The court's decision to remand for further proceedings on the issues of material facts is not only consonant with *Daniels* and *Baker*, precedents upon which the Colorado Supreme Court relied, but it also satisfies any standards or requirements established in *Harker Heights*, 503 U.S. ——, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), a case decided by this Court after the Colorado Supreme Court's decision.

A. The Acts by the Individual Defendants Were Under Color of State Law, Were Arbitrary and Shock the Conscience.

The allegations in the complaint are *not* based on an ordinary roadway accident. They are not predicated on the "mere lack of due care by a state official," nor solely on the fact that state employees merely "fail[ed] to measure up to the conduct of a reasonable person." *Daniels*, 474 U.S. at 331-32.

Much to the contrary, the underlying complaint, as even the petitioners cite, specifically alleges that the in-

dividual defendants deliberately, recklessly, wilfully, wantonly, and with deliberate indifference to human life and safety executed "the following customs and administered the following policies" of the state and its agencies:

> —Pushing large rocks . . . over embankments and slopes, without stopping or warning public traffic lawfully traveling on highways or roadways below;.
>
> —Failing to post adequate numbers of flag persons and warning signs so as to stop traffic when ditch-clearing operations are performed on mountainous terrain;
>
> —Training, instructing, supervising, and guiding employees of the State of Colorado, the Colorado Department of Highways and or Colorado Division of Highways to perform ditch-clearing operations in mountainous terrain in a highly dangerous manner in grossly negligent, reckless, and deliberate disregard of the public safety;
>
> —Emphasizing excessive work-production standards by the State of Colorado, the Colorado Department of Highways and/or Colorado Division of Highways employees with inadequate regard for the public safety; [and]
>
> —Requiring maintenance workers to forego known and relatively simple procedures to break dangerous and potentially lethal rocks into smaller, safer, and more manageable sizes.

These allegations stand in stark contrast to the allegations by the claimant in *Harker Heights*, 117 L.Ed.2d at 273 ("A fair reading of petitioner's complaint does not charge the city with a wilful violation of [decedent's] rights.").

More importantly, there are other allegations which the petitioners' fail to cite. As previously noted, the complaint alleges that the individual defendants "*knew, or should have known or expected . . . , that the travellers were within the range of the [foregoing] dangerous acts. . . .*" (emphasis added). In addition, contrary to the

petitioners' assertion that nowhere "are specific actions and behaviors of individual employees particularized in the fashion demanded by *Anderson v. Creighton*," Petition at 10, the complaint expressly incorporates all of the foregoing factual allegations and more as to each of the named individual defendants. *See Hafer v. Melo*, —— U.S. ——, 112 S.Ct. 358, 116 L.Ed.2d 301, 308 (1991) ("state officials sued in their individual capacities are 'persons' for purposes of § 1983").

In the light of the facts of this case, the petitioners' pallid argument that the individual defendants here merely acted "negligently" is misleading, conclusory and premature. Respondents' complaint alleges that the individual defendants acted "within the course and scope of their employment." That is, the harm to the travellers occurred precisely because employment duties were carried out *as directed and expected*. Massive rocks were deliberately pushed off the mountainside without precaution according to the customs and policies of the Colorado Department of Highways. The rocks were not accidentally nudged off the mountain. Rather, the harms occurred because the defendants performed their duties exactly as they were required to do by Colorado Department of Highways' policies and customs, not because they carried out their duties carelessly. There is a vast difference between, on the one hand, an unconscionable, reckless, wanton policy and conduct deliberately indifferent to human life and safety and, on the other hand, conduct which is simply careless execution of an otherwise constitutionally unobjectionable policy.

The respondents' claims do not arise from a one-time simple act of negligence, but arise directly from the customs and policies of the Colorado Department of Highways. These customs included rock removal operations at a deliberately frantic pace and under such dangerous circumstances as to reflect utter disregard for the safety of the public known to be travelling below. That serious

harm would result from this practice was patently obvious. The custom of deliberately pushing large boulders directly over busy highways, with no warning whatsoever to the travelling public, is arbitrary and conscience-shocking. Because of these customs, the claims here cannot be reduced to the case of a simple negligent act by a state employee which occurred during otherwise reasonable rock removal. Moreover, unlike the claim made in *Harker Heights*, the complaint here cannot be reduced to the simple failure to train governmental employees.

For these reasons, the reinstatement of the § 1983 claims by the Colorado Supreme Court does not, and will not, make the constitutional guarantee of due process of law " 'a font of tort law to be superimposed upon' " the state's tort system, contrary to petitioners' assertions. Petition at 5, quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976).

Finally, petitioners advance the preposterous argument that if a private entity, such as a private road building contractor, can perform the same acts performed by the Colorado Department of Highways' employees, those employees cannot be subject to a § 1983 claim. Most assuredly, private persons can deny others their interests in life, liberty or property. *See DeShaney v. Winnebago County Dept. Of Social Services*, 489 U.S. 189 (1989). That does not mean, however, that when the denial results from governmental employees acting under color of law that it is beyond the reach of § 1983.[2] The petitioners' assertion that "no cognizable civil rights claim exists"

[2] In *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981), for example, a police officer who struck a picture-taking but otherwise peaceful tourist with a nightstick was deemed to have violated the tourist's constitutional rights in an action under § 1983. *Id.* at 265. Applying the petitioners' argument, if the defendant in *Shillingford* had merely pointed out that private persons also are perfectly capable of striking tourists with nightsticks, the suit thereby would have been reclassified as a simple tort suit and not a § 1983 action.

because "only the employer of these alleged tortfeasors distinguishes this from other tort actions," is therefore absurd.

B. The Allegations in the Complaint Are Properly Directed Against the Individual Defendants.

Petitioners' assert that the foregoing allegations would be relevant only if "directed at a municipality" and are thus "irrelevant" here as to the state employees. Petition at 8-9 (citing *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978)). This argument is an exercise in misdirection. That municipalities are "persons" and therefore liable under § 1983, *Monell*, 436 U.S. at 690, *Harker Heights*, 503 U.S. ——, 117 L.Ed.2d at 270, does not mean that the scope of § 1983 liability of individual state actors is thereby diminished. As this Court recently held, the primary "purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. ——, 112 S.Ct. ——, 118 L.Ed.2d 504, 511 (1992).

Monell's inclusion of local government bodies within the definition of "person" in § 1983 was an expansion of liability, not a contraction. Indeed, *Monell* holds that "local governments, *like every other § 1983 'person,'* by the very terms of the statute, may be sued for constitutional deprivations visited *pursuant to governmental 'custom'*. . . ." 436 U.S. at 690-91 (emphasis added). Here, the individual state employees, paradigmatic § 1983 "persons," visited the harms on the travellers on Berthoud Pass pursuant to Colorado Department of Highways' customs and policies. Under *Monell* and subsequent case law, therefore, the allegations here are properly directed against the individual defendants.

CONCLUSION

This case is not ripe for review by this Court. The Colorado Supreme Court remanded the case to the trial court for further hearings in order properly to posture the important federal issues for further review, if necessary. Further hearings by the trial court, far from mooting any federal issues, in fact will serve to crystalize those issues. Moreover, because the allegations by the respondents are consonant with this Court's precedents construing § 1983, this petition for writ of certiorari should be denied.

Dated this 16th day of October 1992.

Respectfully submitted,

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No. 91-1877

IN THE

Supreme Court of the United States

OCTOBER 1991 TERM

THE STATE OF COLORADO, by and through the Colorado State Claims Board of the Division of Risk Management,
Plaintiff-Appellee,

v.

YVONNE E. DEFOOR, FRANK BOWEN; MARGIE BOWEN; ELINOR M. BUTENHOFF; URS FREI; MICHAEL HATTON; THE ESTATE OF ANNA HAYES, Deceased; THE CHILDREN AND ESTATE OF ARLENE JOHNSON, Deceased; ESTATE OF JOHN KILLEEN, Deceased; ESTATE OF MARKUS LANG, HERBERT LAND, as survivor, heir and personal representative of Markus Lang, and THE ESTATE OF MARKUS LANG, RITA LAND, as survivor, heir and personal representative of Markus Lang and THE ESTATE OF MARKUS LANG, and ELFRIEDE BORRILLO, as Special Administrator of the Estate of Markus Lang; THE ESTATE OF DOUGLAS MACKENZIE, Deceased; SUZANNE MACKENZIE; MICHAEL MCGARVEY, NANCY MCGARVEY; BERNADINE M. REMMERS; CAROL J. SMITH, THOMAS C. SMITH, and MEAGAN N. SMITH, a minor; THE ESTATE OF GLADYS STEWART, Deceased; THE ESTATE OF SOL STEWART, Deceased; THE CHILDREN AND ESTATE OF KEITH WALTERS, Deceased; THE CHILDREN AND ESTATE OF KATHLEEN WALTERS, Deceased; HOROSHI YOSHIOKA; MORDEKHAY FUMISHIKA; MASHASIKI NAKAYAMA; MIKAYŌ TAJIMA; and RODNEY ALVA WEST; and CLARENDON NATIONAL INSURANCE COMPANY; SAN JUAN TOURS, INC., d/b/a GRAY LINE TOURS; and all persons or

continued

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entities suffering, or claiming to suffer, damages resultant from the August 10, 1987, collision between a boulder and a Gray Line Tour Bus on U.S. Highway 40, about seven miles east of Winter Park, Colorado, while the bus was on Berthoud Pass,

Defendants-Appellants,

v.

THE COLORADO DEPARTMENT OF HIGHWAYS and THE COLORADO DIVISION OF HIGHWAYS, PHILLIP PACHECO, EARMAN PACHECO, MERLE ZIMER, PHILLIP WEST, ROSS HAMILTON, EDWARD FINK, JOHN M. SALAZAR, R.L. CLEVENGER, DWIGHT BOWER, PHIL MCCULLOUGH, and LOWELL JACKSON,

Third-Party Defendants and Counter Defendants-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO REPLY BRIEF

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JURISDICTION

This Court has jurisdiction to entertain this petition for certiorari pursuant to the provisions of 28 U.S.C. §1257. Respondents contest such jurisdiction in their response opposing any grant of certiorari. For the reasons set forth herein, the question of federal law decided by the Colorado Supreme Court challenged by the petition is final and jurisdiction exists in the Court to review that decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves 42 U.S.C. §1983:

> **Civil Action for Deprivation of Rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Also involved, following the challenge to jurisdiction by respondents, is 28 U.S.C. §1257:

> **State Courts; certiorari**
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question

on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

STATEMENT OF RELATED CASES

On May 26, 1992, the respondents herein filed a petition seeking a writ of certiorari in Case No. 92-1922, relative to the same Colorado Supreme Court decision challenged by this petition, requesting review of the determination by the Colorado Supreme Court that §24-10-114(1), 10A C.R.S. (1988) was constitutional.

BASIS FOR REPLY

A. Clear precedent supports the finality of the Colorado Supreme Court order for purposes of a certiorari petition and jurisdiction exists to grant the requested writ

B. The Colorado Supreme Court was wrong in determining as a threshold matter that an injured highway accident victim may state a federal civil rights claim against individual state employees for violation of an implied federal duty of care toward all those impacted by state activities.

ARGUMENT

A. CLEAR PRECEDENT SUPPORTS THE FINALITY OF THE COLORADO SUPREME COURT ORDER FOR PURPOSES OF A CERTIORARI PETITION AND JURISDICTION EXISTS TO GRANT THE REQUESTED WRIT

Commencing with the decision announced in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L.Ed 2d 328 (1975), this Court has recognized the critical importance of pragmatic analysis in the determination of "finality" for purposes of asserting certiorari jurisdiction over state courts. To effectuate decisions respecting the issue, *Cox Broadcasting* established four categories of cases where finality exists for purposes of certiorari jurisdiction under 28 U.S.C. §1257, even where issues remain to be resolved in such cases. At least two of the *Cox Broadcasting* categories apply to the Colorado Supreme Court decision in this case.

Cox Broadcasting first recognizes as final that category of cases where the highest state court decides a federal issue in conclusive fashion and preordains the outcome of any further proceedings in the state court. The instant case fits category one because any future Colorado state court proceedings will not consider further the threshold issue raised by petitioners at the outset of this matter: i. e., whether claimants could ever state a damages cause of action under the federal civil rights law arising out of a disastrous highway accident. The remand ordered by the Colorado Supreme Court in the case will permit no further visitation of this issue in the lower Colorado courts, while it will remain the law of the case on any future review. Only a reversal of the state court conclusion on the issue by this Court will alter the outcome as to this federal question in any fashion. Further, such a reversal would also eliminate any further proceedings with respect to this federal question in the state courts.

This case is much like *Asarco, Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989). As in that case, there will

be no further trial court consideration of the threshold federal question raised by petitioners and the course of further trial court proceedings is preordained in this regard. The decision is also analogous to *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988). Like the Mississippi Supreme Court, Colorados's high court has already answered the critical federal question—whether a federal civil rights duty to the public exists for individual state employees engaged in roadway maintenance operations—and the judgment on this issue is now ripe for review. *Mississippi Power & Light, Id.*, 108 S.Ct. at 2438, n. 11.

Cox Broadcasting further recognizes as final that category of case where the state's highest court pronouncement necessitates further proceedings in which a petitioning party may prevail on nonfederal grounds, rendering federal review unnecessary, and where a refusal to review on certiorari may erode federal policy. *Cox Broadcasting, supra*, 95 S.Ct. at 1040. In such cases, certiorari may be granted to eliminate the prospect that an unreviewed and unreviewable state court decision might cause serious erosion in a federal policy respecting an important federal issue. The instant situation compares in favorable respects to both *Asarco, supra* and *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 108 S.Ct. 1704, 100 L.Ed.2d. 158 (1988) with regard to such finality.

As in both such cases, the federal issue presented to the Court through this petition will not be revisited on remand at the trial level in the state court. However, multiple other issues remain for determination by the trial court and numerous opportunities to prevail exist for petitioners before that court. In addition, the unprecedented nature of the Colorado Supreme Court civil rights duty pronouncement contested by this petition establishes the substantial federal policy erosion potential existent in this case, should no review of the state court opinion occur.

Because it involves federal civil rights claims against individual public entity employees, this case possesses an additional element of significance, not present in other decisions respecting the exercise of certiorari jurisdiction by this Court. *Mitchell v.*

Forsythe, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) assures the state employees named defendants here that any adverse pretrial decision respecting their qualified immunity to any civil rights claims asserted against them may be reviewed on an interlocutory basis. The Colorado high court has ordered this matter back to the trial court without requiring a further articulation of the basis for civil rights claims and in the absence of any precedent establishing that any constitutional right may be violated in the course of a roadway accident. This decision jeopardizes the immunity protection acknowledged in *Mitchell v. Forsythe* and only the exercise of certiorari jurisdiction will permit correction of the error made by the Colorado Supreme Court.

Absent any indication that petitioners may again argue the invalidity of claims against them to any Colorado appellate authority, or obtain any interlocutory review of a decision denying them qualified immunity from the claims asserted against them, the 'finality' of the Colorado Supreme Court order becomes even more apparent. In determining that *any* prospect existed to establish a federal civil rights claim against the petitioners, the Colorado high court effectively relegated them to a full blown trial on all issues prior to any further review by a state appeals court. Such an outcome defies the specific directive of *Mitchell v. Forsythe*, in that it precludes immunity from the expense and anxiety of trial preparation, even if allowing an immunity to judgments.

This Court's decisions in *Cox Broadcasting, Asarco, Mississippi Power & Light*, and *Goodyear Atomic Corp.* all establish the parameters for the analysis of 'finality' under 28 U.S.C. §1257. Applying such principles to the instant petition results in a demonstration that 'finality' exists in the Colorado Supreme Court order at issue and in the propriety of a jurisdictional exercise under the statute with respect to the instant petition.

B. THE COLORADO SUPREME COURT WAS WRONG IN DETERMINING AS A THRESHOLD MATTER THAT AN INJURED HIGHWAY ACCIDENT VICTIM MAY STATE A FEDERAL CIVIL RIGHTS CLAIM AGAINST INDIVIDUAL STATE EMPLOYEES FOR VIOLATION OF AN IMPLIED FEDERAL DUTY OF CARE TOWARD ALL THOSE IMPACTED BY STATE ACTIVITIES

The unanimous decision of this Court in *Collins v. City of Harker Heights, Texas*, ___ U.S. ___, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) reiterates the essential processes required whenever a federal civil rights claim is analyzed. There, the Court established as the first, critical decision point whether the facts alleged by a complaint could suffice to state a violation of protected rights, whatever other circumstances might apply. Similarly, in *Siegert v. Gilley*, ___ U.S. ___, 111 S.Ct. 1789, ___L.Ed.2d ___ (1991), the Court recognized as mandatory allegations establishing a violation of a "clearly established constitutional right" in a civil rights complaint. Respondents satisfied neither requirement and the failure of the Colorado high court to recognize such fatal deficiencies on review demonstrates the necessity for certiorari.

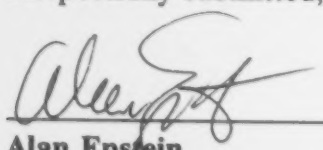
Respondents seek judicial recognition for the proposition that public employees owe a federal constitutional duty to provide members of the public at large with a certain, unspecified, minimal level of safety and security on a highway. In this sense, the matter is a direct, though more expansive, parallel to the factual circumstances in *Collins, infra*, (public entity duty to public employees) and *Siegert, infra*, (public employee supervisor duty to public employees). In neither case was this Court willing to acknowledge any claimed Constitutional duty and respondents offer nothing to support their claim that this case presents a distinguishable circumstance.

Even accepting the allegations respecting motive, intent and purpose as found in the claims of respondents, nothing supports the conclusion that these facts may be differentiated

from an ordinary intentional tort claim under state law. Moreover, respondents offer no previous controlling decision as demonstrating the "clearly established" character of the responsibility they seek to impose upon petitioners. For both such reasons, the Colorado Supreme Court is incorrect that a federal civil rights claim was stated by respondents and the decision to remand the matter for further proceedings was in direct conflict with *Collins, infra*, and *Siegert, infra*, among other decisions of the Court. Because respondents offer no viable support for the Colorado high court decision, certiorari is required to rectify the mistakes made in that decision and to reiterate the demarcation between state tort and federal civil rights claims.

Dated this 31st day of October, 1992.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that on this 30th day of October, 1992 a true and correct copy of the foregoing ***REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO*** was mailed by placing the same in the United States Mail, postage prepaid, addressed as follows:

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